No. 4063

IN THE

United States Circuit Court of Appeals for

NINTH CIRCUIT

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY,
a Utah Corporation, Defendant in Error.

Brief of Defendant in Error

Names and Addresses of Attorneys
Upon this Brief:

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UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF OREGON

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INDEX

Index to Cases Cited

The original complaint in this action was based on a single alleged transaction, being the transaction set forth in paragraph 16 of the second amended complaint. By leave of Court the plaintiff in error amended his complaint and alleged in substance that on July 1, 1917, defendant in error became the owner of 27,331.31 acres of timber lands in Oregon, was desirous of developing the same and securing transportation facilities and of marketing the timber thereon and that in August following it entered into a contract with plaintiff in error whereby he was employed to look after the property, to assist in marketing the timber thereon, in devising ways and means of securing the best possible returns from said property, and contracted and agreed to pay him for his services and to reimburse him expenses in carrying out and performing the services agreed upon; that he immediately entered upon the work of his employment and at all times held himself in readiness to perform and his services were at the disposal of the defendant in error.

He then set out in paragraphs 5 to 19 inclusive fifteen different transactions in which he alleges he performed services and incurred expenses under the alleged contract of August, 1917. These alleged transactions cover a period from August 6, 1917, to November, 1920.

Defendant in error filed a motion to strike this amended complaint on the ground that it pleaded fifteen separate causes of action which were not separately stated but were pleaded as a single cause of action. This motion was denied by the court. Thereupon the defendant in error filed a motion that plaintiff in error be required to elect whether

he would rely on a quantum meruit or on an express contract. This motion was also denied.

The defendant then filed a demurrer to this amended complaint, as follows:

> "Comes now the above-named defendant, the Oregon-American Lumber Company, by its undersigned attorneys, and demurs to the amended complaint of the plaintiff filed herein on the following grounds, to-wit:
>
> First. That the plaintiff has not the legal capacity to sue on the grounds and for the reason that the amended complaint of the plaintiff shows on its face that the plaintiff is a real estate broker and has not alleged in his amended complaint that he had a license to act as such real estate broker, as is required by the laws of the State of Oregon.
>
> Second. That the amended complaint of the plaintiff, does not state facts sufficient to constitute a cause of action.
>
> DeVINE, HOWELL, STINE & GWILLIAM,
> and W. A. MUNLY.
>
> Attorneys for the Defendant, Oregon-American Lumber Co."

This demurrer was overruled, and defendant in error filed its answer in which it admitted that appellant was a citizen and resident of Oregon; that defendant in error was a corporation formed under the laws of Utah, and domiciled in that State, but licensed to do business and was doing business in the State of Oregon; that on July 1, 1917, it became the owner of 27,331.31 acres of timber lands in

Columbia, Clatsop and Tillamook Counties, Oregon, for which it paid $3,650,000.00, and which was undeveloped, with no transportation facilities and that it was and is valuable chiefly for its standing timber; that it was desirous of developing said timber lands, and of securing transportation and marketing the timber thereon, and denying that it ever entered into any contract with plaintiff in error and denying generally or specifically all the other allegations of said amended complaint as to any services rendered to defendant in error by plaintiff in error and as to any expenses incurred by him at the request or on behalf of defendant in error.

This answer then set up certain affirmative defenses in substance:

(1) That plaintiff in error, at all times mentioned in the amended complaint was a real estate broker, but had not secured any license to do business as such;

(2) That at no time was there any contract or memorandum in writing signed by defendant in error or any person authorized to make any contract on its behalf, employing or authorizing plaintiff in error to sell or purchase any real estate or any interest therein as agent for defendant in error for compensation or commission; or to sell or purchase, or to negotiate the sale or purchase of any real estate or any interest in real estate or other property; or to sell or negotiate the sale of any lands or other property of defendant in error, or to do anything which plaintiff in error in said amended complaint alleges that he did under the alleged contract of August, 1917.

(3) That at all times mentioned in said amended complaint defendant in error was a corporation organized and existing under the laws of Utah, with a board of five directors, and that its articles of incorporation do not provide for the sale or other disposition of the property of the corporation, by its board of directors or other officers of the corporation, and that no officer or agent of defendant in error had any authority to make on its behalf the contract or contracts of hiring or employment or any of them, set out in said amended complaint, or to make any contract with plaintiff in error for the sale of or negotiating for the sale, purchase or lease of any lands or other property on behalf of defendant in error, and that no such contract had ever been made by its board of directors or with their knowledge or consent.

(4) That defendant in error was not at any time authorized, by law or its articles of incorporation to make any contract by which it would be liable for any commission or compensation to the plaintiff in error for the sale of any of the stock of its stockholders.

(5) That none of its officers or agents were at any time authorized to employ plaintiff in error to secure purchasers for, or to dispose of the capital stock of its stockholders and that the corporation and its officers were without power to employ the plaintiff in error to sell any of the stock of its stockholders.

The plaintiff in error filed a reply denying the affirmative allegations of the answer and pleading that all the matters and things set forth in his amended complaint were known to the directors, officers and agents of the

defendant in error, and that such officers and agents permitted its officers and agents at Portland, Oregon, to hold themselves out to be fully clothed with power to represent defendant in error in all matters and things set out in the amended complaint, and referred to therein.

By this appeal, the question presented is, was the verdict in favor of defendant in error properly directed by the trial court? It was, provided that:

1. The second amended complaint fails to state a cause of action; or

2. If the evidence offered by plaintiff in error was insufficient to show that Chas. T. Early was authorized to make, on behalf of defendant in error the contract which plaintiff in error alleges was made between him and the defendant in error in August, 1917.

We propose to discuss these questions in their order.

The insufficiency of the complaint can of course be raised at any time, even on appeal, and therefore if it does not state a cause of action, the verdict was properly directed without regard to the sufficiency of the evidence to prove the authority of Early to bind the defendant in error by the alleged contract.

An examination of the second amended complaint discloses the fact that in all of the paragraphs wherein the services alleged to have been performed are set out, except paragraphs 16 and 19, the services alleged to have been performed consisted of negotiating for the purchase, sale or leasing of real estate, and in those two paragraphs he

claims for negotiating for the sale of capital stock, which services extended over more than three years of time, and for which services plaintiff in error claims compensation.

The complaint therefore fails to state a cause of action:

First—Because it shows on its face that plaintiff in error was at all the times mentioned therein engaged in the business of a real estate broker both under the common law and under the statutes of Oregon, and there is no allegation that he had obtained a license as such broker, as required by Sections 8309 to 8316, inclusive, of Olson's Oregon Laws.

Sec. 8309 Olson's Oregon Laws defines a real estate broker as "a person engaged in the business of negotiating or offering to negotiate for others for compensation or profit either directly or indirectly—"the purchase, sale, exchange, lease or rental of real estate or any interest therein as his principal or partial vocation."

Sec. 8310—Declares it to be unlawful for any person to engage in the business of real estate broker without first obtaining a license.

Sec. 8315—Makes it a misdemeanor punishable by fine for any person to engage in the business of real estate broker without having a license.

Sec. 8316—Provides that no person engaged in the business of real estate broker without a license can maintain any action in the courts of Oregon, for the collection of compensation for negotiation of a purchase, sale, exchange, lease or rental of real estate.

This last section alone would not prevent the maintenance of such an action in the federal courts, but where, as here, the statute declares it unlawful and fixes a penalty for the doing of certain things, a contract to do such prohibited things is void even though not so declared by the statute.

Holt vs. Green, 73 Pa. St. 198; 13 Am. Rep. 737.

Brooks vs. Cooper 50 N. J. Eq. 761; 35 Am. St. Rep. 793.

American etc. Exchange vs. Blunt, 102 Me. 138; 66 Atl., 212; 120 Am. St. Rep. 463; 10 L. R. A.-N. S. 414.

Woods vs. Armstrong 54 Ala. 150; 25 Am. Rep. 671.

Randall vs. Tuell 89 Me. 443; 36 Atl. Rep. 910.

Harding vs. Hagar, 60 Me. 340; 63 Me. 515.

Thomas vs. Birmingham etc. Co. 195 Fed. 340.

Dudley vs. Collier, 87 Ala. 431; 13 Am. St. Rep. 55.

It is true that the contract sued on is alleged to have been made prior to the enactment of the foregoing provisions of the Oregon Statutes, but a contract valid when made may become invalid by subsequent legislation.

Woods vs. Armstrong, 54 Ala. 150; 25 Am. Rep. 671.

American etc. Exchange vs. Blunt, Supra.

Mottley vs. Louisville & N. R. Co., 219 U. S. 478.

There can be no vested right to do wrong, hence

a law prohibiting the doing of that which is injurious to the health or morals of the public or inimical to the public welfare, does not impair the obligations of a contract which but for the law would be valid.

120 Am. St. Rep. 468 Note & Cases cited.

The complaint does not allege that plaintiff in error at any time had a license as a real estate broker.

It follows, that since plaintiff in error had no license as a real estate broker, any pursuit of that business after the passage of the act of 1919, on the subject, would be unlawful and for any services as a real estate broker rendered after that time he could not recover in any action.

Luce vs. Cooke, 227 Pa. St. 224; 75 Atl. Rep. 1093.

Stevenson vs. Ewing, 87 Ten. 46; 9 S. W. 230.

Hustis vs. Picklands, 27 Ill. App. 271.

Reeder vs. Jones, 65 Atl. 571 (Del.).

Riley vs. Chambers, 181 Calif. 589; 185 Pac. 855.

Johnson vs. Hulings, 103 Pa. St. 498; 49 Am. Rep. 131.

See also Page on Contracts §691.

And since plaintiff in error has elected to treat the contract as entire and indivisible, he cannot recover in this action, even conceding that he might have recovered for services rendered prior to the passage of the statute we have quoted, if he had treated the several items of service so performed as a separate cause of action and brought his action accordingly.

Burke vs. Child, 21 Wall. 441; 22 L. ed. 623.

Meguire vs. Corwine 101 U. S. (11 Otto 108) 25 L. Ed. 899.

Hazelton vs. Sheckels 202 U. S. 71; 50 L. Ed. 939.

Cleveland etc. R. Co. vs. Hirsch, 204 Fed. Rep. 849.

Mann vs. Brady (Okl) 196 Pac. Rep. 346.

Douthart vs. Congdon 197 Ill. 349; 64 N. E. Rep. 348,

is a case directly in point. We quote the syllabus.

> "Where a city ordinance prohibited brokers from transacting business without a license, and provided a fine for a violation thereof, a note given to brokers in settlement of business transacted by them for the maker, which included charges for services when the broker had acted without a license, is absolutely void, though such charges constituted a small part of the consideration, and was an ascertained amount, the illegality vitiating the whole consideration."

Kimbrough vs. Lane 11 Bush (Ky.) 556.

Wagner vs. Bierning, 65 Tex. 506.

Snider vs. Willy, 33 Mich. 483.

Many other cases might be cited, but we deem it unnecessary as there is really no contrariety of opinion on the subject.

The plaintiff in error having sued to recover $234,002.13, on a single cause of action, as he has elected to treat it, and a great portion of the amount claimed, being claimed

for alleged services which were rendered in violation of the laws of Oregon, the entire transaction is tainted with illegality, and this appearing on the face of the complaint no cause of action is stated, and the demurrer of defendant in error should have been sustained and a verdict for defendant in error was properly directed.

Second: Another reason why the second amended complaint is fatally defective and states no cause of action is that:

The statute of Frauds of Oregon, Section 808, Olson's Oregon Laws, provides as follows:

In the following cases the agreement is void unless the same or some memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent:

> "8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; provided, however, that if the note or memorandum of such agreement be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and contains a description of the property sufficient for identification, and authorizes or employs the agent or broker named therein to sell such property, and expresses with reasonable certainty the amount of the commission or compensation to be paid such agent or broker, such agreement of authorization or employment shall not be void for failure to state a consideration."

Under that portion of Section 808, which we have quoted any and every agreement authorizing or employing an agent or broker to sell or purchase any real estate for a *compensation* or *commission* which is not in writing and subscribed by the party to be charged is absolutely void. And even if such an agreement is in writing the consideration must be expressed therein and such memorandum so signed must contain a description of the property sufficient for identification, and must authorize or employ the agent or broker named therein to sell such property, and must express with reasonable certainty the amount of commission or compensation to be paid to such agent or broker.

We are not unmindful of the rule that the party pleading a contract which comes within the purview of this statute, need not allege that such contract was in writing, but that rule does not relieve the pleader of the necessity of pleading the terms and conditions of the contract. If the contract pleaded in this case, is one whereby defendant in error employed plaintiff in error to purchase or sell any real estate and was in writing, to be valid it must have expressed the consideration for the contract or must have contained a description of the property, and by its terms have authorized the plaintiff in error to purchase or sell the property described and must have expressed with reasonable certainty the commission or compensation to be paid to him for effecting such purchase or sale. In an action on such a written contract, the contract must be set out in the complaint or its legal effect must be pleaded. It would therefore be necessary to allege the employment, the authority to sell or purchase, the description of the property to be purchased or sold and the commissions or

compensation to be paid. A complaint alleging that the parties entered into a written contract whereby the defendant employed the plaintiff to purchase or sell real estate, without setting out the contract, or alleging the consideration therefor, or setting out a description of the property and alleging that the plaintiff was authorized to purchase or sell the same, and the amount of commission to be paid would state no cause of action. And of course, while it need not be alleged that the contract was in writing, that is so because it will be presumed that the contract was a valid one, or in other words that it was in writing. It does not relieve the party from alleging any other essential facts. It would be absurd to say that where the contract is alleged to be in writing, the facts essential to its validity, that is, the consideration therefor, the description of the property, the authority of the agent or broker and the commission or compensation to be paid, must be alleged, but that where the contract is not alleged to be in writing, and therefore is only presumed to be so, it is not necessary to plead the essential facts above named, which must exist under the statute in order to constitute a binding contract. This presumption only takes the place of an allegation that the contract was in writing.

Although it will be presumed that the contract was in writing, to entitle plaintiff to recover he must allege and prove the facts essential to such a valid contract, and the proof must be made by a written instrument.

It is alleged in the second amended complaint, that immediately after the defendant in error purchased the timber land mentioned in said complaint, the plaintiff in

error was employed by defendant in error to aid in developing and marketing said property. To market the property would of course be to sell it. The complaint, however, nowhere describes the property, nor does it allege with reasonable certainty or at all the commission or compensation to be paid to appellant. On the contrary it simply alleges that defendant in error agreed to pay plaintiff in error for his services and to reimburse him for his expenses. Then in paragraphs 5 to 19 inclusive he sets out the various items of services and expenses for which he seeks to recover.

It will be observed that all of these alleged transactions except those mentioned in paragraphs 16 and 19 involve negotiations for the purchase or sale of real estate, and those two involve negotiations for the sale of capital stock of the defendant in error company. Now it is claimed and alleged that the services rendered in each instance were rendered in pursuance of the contract of August, 1917. There is no averment that any contract was entered into subsequent to and independent of that contract. In none of these various instances except in paragraphs 18 and 19, is there any allegation as to the amount of the commissions or compensation to be paid, and in none of them is the property to be sold or leased described so that it could be identified.

It is settled beyond cavil by the decisions of the Supreme Court of Oregon, that under subdivision 8, of Section 808, the alleged contract involving as it did the purchase and sale of real estate, must not only have been in writing but must also have contained a description of the

property and must have expressed the amount of commissions or compensation to be paid.

> Oregon Home Builders v. Crowley, 87 Ore. 530, 170 Pac. 718.

In the case cited, in discussing the question of the necessity of the amount or rate of commission being stated in writing, Mr. Justice Harris, speaking for the Court, says:

> "The difference between the views expressed by courts of other jurisdictions as well as the expressed statutory requirements in some of the states, only illustrate the real difficulties that may arise out of seemingly plain statutes like subdivision 8 of Section 808, L. O. L. However, all further debate in this state is foreclosed by this court speaking through Mr. Justice Benson in Taggart v. Hunter 78 Ore. 139; 150 Pac. 738; 152 Pac. 871; where after exhaustive presentation by learned counsel and a careful consideration of all phases of the question, it was concluded that if the writing is silent upon the amount of the commission to be paid, it fails to satisfy the statute of frauds. Subdivision 8 was designed as a remedy for a two-fold evil; (1) brokers claiming commissions when they have never been authorized to sell; and (2) brokers claiming excessive rates although authorized to sell. The conclusions reached in Taggart v. Hunter, that the writing must state the amount or rate of commission to be paid, is justified by the history and purpose of the statute."

This construction of Subdivision 8, of Section 808, of the laws of Oregon is, of course, binding on the Federal Courts.

Beckwith v. Clark, 188 Fed. Rep. 171;
Traer v. Fowler, 144 Fed. Rep. 810;
Walker v. Hafer, 170 Fed. Rep. 37;
Lloyd v. Fulton, 91 U. S. 485; 23 L. Ed. 363;
Hairston v. Danville, 208 U. S. 598; 52 L. Ed. 637.

In no instance where plaintiff in error is claiming a commission or compensation for negotiating for the purchase or sale of any real estate or interest therein, except in paragraphs 18 and 19, is there any averment in the complaint as to the rate or amount of commission or compensation to be paid and in no instance is there any allegation describing the property.

There being no written contract, nor any contract expressing the rate or amount of commission to be paid, there can be no recovery on account of any of the alleged negotiations for the purchase or sale or leasing of any real estate, for there can be no recovery upon quantum meruit.

Lueddeman v. Rudolf 79 Or. 258, 154 Pac. 116; 155 Pac. 172;
Oregon Home Builders v. Crowley, 87 Or. 530; 170 Pac. 718;
Leimbach v. Regner, 70 N. J. Law, 608; 57 Atl. 138;
Cushing v. Monarch Timber Co., 75 Wash. 678; 135 Pac. 660;
Paul v. Graham, 193 Mich. 447; 160 N. W. 616;
Weatherhead v. Cooney, 32 Idaho 127; 180 Pac. 760.

Fortunately, for our purposes, there is a full discussion and annotation of this matter in 17 American Law Reports,

page 891. It will be seen that the only case in which there is a discordant note is that of Seifert v. Dirk, 184 N. W. Rep. 698 (Wisconsin), and in that case three of the Justices united in a dissenting opinion.

The annotation on page 891, 17 A. L. R. lays down the established principle as follows:

> "A broker cannot recover for his services in buying or selling real estate upon a quantum meruit where his contract was not in writing, when that is required by the statute in relation to brokers."

In support of this, decisions from California, Idaho, Indiana, Michigan, Nebraska, New Jersey, Oregon, Utah, and Washington are cited and the statute is given in each case.

The reason for the rule and decisions is stated by a number of the courts that to permit a recovery on a quantum meruit would be practically to nullify and defeat the purposes of the statute.

Some of the reasons given by the courts as stated in the above note, are as follows:

> "In Leimbach v. Regner (1904) 70 N. J. L. 608, 57 Atl. 138, supra, the court said: 'The plaintiff, however, claims to recover on a quantum meruit. This is a mere attempt in this case to evade the statute.
>
> "'To permit a recovery upon the quantum meruit or upon an implied contract would be to defeat the purpose of the statute, and supply by implication a contract which the statute expressly says

may only be proven by written evidence." Cushing v. Monarch Timber Co. (1913) 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1915C, 1239.

In Paul v. Graham (1916) 193 Mich. 447, 160 N. W. 616, the court said, referring to the amendment to the Michigan statute: "It has been the rule of this court to permit recoveries for services actually performed under contracts void under the Statute of Frauds, either at the contract price or under a quantum meruit * * * * If this rule is to be made applicable to this section of the Statute of Frauds, it would practically nullify the effect of the statute. Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the quantum meruit. In order to give the act the effect which the legislature evidently intended it should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing. This is in accord with the holding of other courts which have construed similar statutes."

In Weatherhead v. Cooney (1919) 32 Idaho 127, 180 Pac. 760, supra, the court said: "Though we recognize the distinction between void and voidable contracts, we are, nevertheless, unable to see why recognition of the right to recover under the oral contract alleged herein, or under a quantum meruit for the reasonable value of services rendered by the appellant herein, would not completely abrogate the statute."

See also Selvage v. Talbot, 95 N. E. 114 (Ind.), 33 L. R. A. (N. S.) 973 and note; Thomas V. Birmingham etc. Co.,

195 Fed. Rep. 340.

Coming to Oregon, in Lueddemann v. Rudolf, 79 Oregon, p. 258, 155 Pac. 174, we find the following from Justice Burnett, delivering the opinion of the court:

> "The deduction is that in Oregon, under the present state of the law, there can be no implied contract to pay a commission to a real estate broker. Unless he has an express contract complying with the statute of frauds, he is as helpless in his effort to recover compensation at law as though he endeavored to prove a conveyance of land without a deed, or a bequest without a will."

And further on page 259, of the State Report, page 174 of the Pacific Reporter, the decision says:

> "The statute was designed as a protection against importunate and unscrupulous real estate agents who thrust themselves upon anyone having realty for sale and claim commissions under any and all circumstances. Tacked as it was to the statute of frauds, it is a very drastic measure, and in this instance it may have operated harshly upon deserving men; but we cannot disregard the plain words of the law. The only relief from it must be found in a change of the legislative enactment by that department of the government."

These citations show the policy of the statute such as exists in the state of Oregon as declared by the courts.

We contend, therefore, under that statute, and under the decisions of the courts, including the Lueddemann Ru-

dolf case, by the Oregon Supreme Court, there can be no recovery on a quantum meruit.

We have shown hereinbefore that no recovery can be had on an express contract, unless the contract expresses with reasonable certainty the amount of the compensation or commission, and now we have demonstrated on the strength of the overwhelming weight of authority, sustained by the reasons that induced the legislatures to enact such laws, that no recovery can be had on a theory of quantum meruit. So either way this contract may be viewed, it is under the ban of the Statute of Frauds and is void.

If part of an entire contract is void under the Statute of Frauds, it is void in toto.

The claim may be made, however, that part of the alleged services set forth in the plaintiff's amended complaint, do not concern an interest in real estate, and are not on that account subject to the statute of frauds. But the plaintiff is then confronted with the established and well-settled principle that where a part of an entire contract is subject to the statute of frauds, the whole will be infected and will fall.

As said in 20 Cyc. 285, with citation of cases:

> "If part of an oral contract falling within the scope of the statute of frauds is in violation of the statute, the whole contract, if it is entire and indivisible, is unenforcable."

And in 25 Ruling Case Law, p. 704:

> "If the contract is entire and part is within the statute, it is unenforcable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part."

In the note to Todd v. Bettingen, is a thorough discussion of the case in 8 Ann. Cas. 963, beginning as follows:

> "Where there is an entire promise, including something void by a statute, the plaintiff cannot separate it, and reject or waive the part of the promise which is within, and recover for that which is without the statute.
>
> Loomis v. Newhall, 15 Pick. (Mass.) 159 This rule applies to parol contracts which are entire and indivisible. Rand v. Mather, 11 Cush. (Mass.) 1."
>
> In the case of a parol contract which is entire and indivisible and partly within the statutes of frauds, "the law is well settled that where the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that where a district engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon such stipulation, however free from the statute of frauds it may be."
>
> Higgins v. Gager, 65 Ark. 604, 47 S. W. Rep. 848. Accordingly it has been held in numerous cases, both in the United States and in England, that if one part of a parol contract falls within the statute of frauds, and the contract is entire and indivisible, the contract is invalid to such an extent that the part not falling within the statute of frauds, as well as that within the statute, cannot be enforced in any court."
>
> Many cases are cited in this note.

We claim, therefore, that the allegations of the plaintiff in error, in his amended complaint conclusively establish that he was a real estate broker; that he cannot recover on an express contract, according to the provisions of Section 808, subd. 8, of the Oregon Code, and the decisions of the Oregon Supreme Court, notably Oregon Home Builders v. Crowley Supra., which hold that the amount or rate of compensation must be stated in the writing, and that in the instant case, plaintiff clearly claims for the reasonable worth of his services; further, that plaintiff cannot recover on a quantum meruit, because the authorities almost unanimously hold under a statute such as our Section 808, subd. 8, that to permit a recovery would nullify the statute (see 17 A. L. R. 891, Supra for a full annotation of cases;) and that while the claim may be asserted that part of the services performed under the alleged contract were not under the Statute of Frauds, still as we have shown by citation of authorities, the established rule is that when part of an entire contract, as the present one is declared to be, is under the ban of the statute, the whole contract is infected and is void.

Giving plaintiff in error the benefit of the rule that it need not be alleged that the contract was in writing the alleged contract, if in writing, would nevertheless be invalid because it does not describe the property to be purchased or sold, nor state the rate or amount of commissions or compensation to be paid.

And part of the contract being void under subdivision 8 of Section 808, L. O. L. the entire contract is void.

It was held in Selvage vs. Talbott, Supra , that a written contract for the payment of commissions for the sale

of real estate, but which leaves the amount of the commissions to be determined by parol, cannot be enforced, as the failure to express the amount of the commission renders the entire contract void.

See also Foote vs. Robbins 50 Wash. 277; 97 Pac. 103.

A contract partly written and partly verbal is a parol contract and a contract employing an agent to sell lands, which leaves the amount of commissions to be paid to be determined by parol evidence, is under a statute like that of Oregon, void.

Zimmerman, vs. Zehender, 164 Ind. 466; 73 N. E. 920.

Assuming, then, for the purpose of testing the sufficiency of the complaint in this case that the alleged contract was in writting it is void for failure to describe the property to be leased, purchased or sold and for failure to express the rate or amount of commissions or compensation to be paid.

So far as the allegations of paragraphs 16 and 19 are concerned they are wholly insufficient for it is not alleged that defendant in error owned any of its own capital stock, and it could not be bound by any agreement made on its behalf by any if its officers, to pay a commission for the sale of capital stock owned by its stockholders.

The alleged contract was void for another reason and therefore the verdict was properly directed. It is alleged that plaintiff in error was employed to look after the development of over 27,000 acres of timber lands and to assist in marketing the same and the timber thereon. Early testified that the alleged contract of employment was oral

and was made immediately after defendant in error obtained title to this property and with a view of buying or building railroads to facilitate such development of this property. It is apparent it was within the contemplation of the parties that the alleged contract was not to be performed within a year but would extend over several years. It would therefore be void under subdivision 1 of Section 808 Olson's Oregon Laws, reading as follows:

> An agreement that by its terms is not to be performed within a year from the making thereof;

We are aware of the fact that there are many cases which hold that if no definite time has been fixed for the performance of a contract and it can be seen from the terms of the contract itself that there is a possibility of its performance within one year, then the statute would not apply. But on the other hand, if it appears that it is the manifest intent and understanding of the parties that the contract contemplated a longer period than one year for its performance, although there is no express agreement to that effect, it is within the statute. One of the leading cases is that of White v. Fitts, 102 Me., 240, 66 Atl. 533.

That case was an action to recover damages for the breach of an oral contract to cut and saw into logs the stave wood standing on a lot of land owned by the defendant. The breach alleged was the refusal on the part of the defendant to allow the plaintiff to complete the work after he had entered upon the execution of the contract. One of the defenses set up by the defendant was that the agreement between the plaintiff and the defendant was an oral one, which was not to be performed within one year. There was

no memorandum in writing of the agreement. The Court in discussing the question says:

> "The provision of the statute for the prevention of frauds and perjuries here involved is found in chapter 113 of the Revised Statutes (Sec. 1) as follows: 'No action shall be maintained * * * (5) upon any agreement that is not to be performed within one year from the making thereof, * * * unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith," etc.
>
> It is contended in behalf of the defendant that, according to the principles of law governing the construction and application of this clause of the statute: (1) The contract must be interpreted in the light of its subject-matter and the circumstances surrounding it, and, if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, it falls within this clause of the statute of frauds. (2) Any contingency terminating a contract within the one-year clause of the statute of frauds must leave the contract fully and completely performed in order to take it out of the operation of this clause of the statute.
>
> "In Browne on the Statute of Frauds, 5th ed., Sections 273, 279, 281, the author says: "Postponing the questions, What is the performance of such an agreement? and What the meaning of the limitation as to time? we are first to ascertain the force of the words "to be performed." And on these words much reasoning has been expended. The result seems to be that the statute does not mean to in-

clude an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making. The statute, finding them perfectly free to make a certain contract, without a writing, provides simply that, if that contract does, by its terms, expressed, or, from the situation of the parties, reasonably implied, require more than a year for its performance, they must put it in writing; in other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making."

And, in Section 281: "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying . . . . Such an accomplishment must be an execution of the contract according to the understanding of the parties."

In 1 Chitty on Contracts, 11th ed., p. 99, the principle is thus stated: "This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being that, where the agreement distinctly shows, upon the face of it, that the parties contem-

plated its performance to extend over a longer period than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appears to have been the understanding of the parties at the time that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period. See also 29 Am. & Eng. Enc. Law p. 94, and 20 Cyc. Law & Prac. p. 198.

In the English case of Boydell v. Drummon, 11 East, 142, the plaintiff proposed to publish a series of illustrated scenes from Shakespeare in eighteen numbers; one number at least annually. After receiving two numbers, the defendant refused to take any more. Although there was no express agreement that the contract should not be performed within a year, the court held that it was "impossible to say that the parties contemplated that the work was to be performed within a year;" but that, on the contrary, "the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute of frauds." That decision has been confirmed by both English and American courts in numerous cases. Hill v. Hooper, 1 Gray, Mass. 131.

In Peters v. Westborough, 19 Pick., 364, 31 Am. Dec. 142, the court says: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year." But who can doubt what the express and specific understanding of the parties in the case at bar was? And that it was not to be performed within one year? Or, at any rate, that it appears to have been so understood by them?

In Doyle v. Dixon, 97 Mass, 208, 93 Am. Dec. 80, it was held that an agreement not to go into business in a certain place for five years was not within the statute, as the death of the promisor would complete the performance of the contract; but the court, after comparing the case with Peters v. Westborough, supra, says: "On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute." See also Carnig v. Carr, 167 Mass., 544, 35 L. R. A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; De Montague v. Bacharach, 187 Mass. 128, 72 N. E. 938; Warner v. Texas & P. R. Co. 164 U. S. 418, 41 L. Ed. 495, 17 Sup. Ct. Rep. 147; Metropolitan Trust Co. v. Topeka Water Co. (C. C.) 132 Fed. 702."

In Jones v. McMichael, 12 Rich. L. (S. C.) 176, one agreed to erect a sawmill on the land of another, who was to deliver all the timber growing on a certain tract, and the profits were to be divided. This continued until the death of the owner of the land. It was held that, if it appeared from the quantity of timber and the capacity of the mill that the parties contemplated the lapse of a longer period than one year before the enterprise could be fully executed, then the agreement was within the statute. And it was also held that it could not have been performed by plaintiff until he had sawed the whole of the specified timber.

In Pitkin v. Long Island R. Co. 2 Barb. Ch. 221, 47 Am. Dec. 320, it was held:

"A permanent arrangement to stop trains at a certain place in consideration of plaintiff grading for a railroad track was held to be within the statute, because, from the nature and terms of the agreement, it was not to be performed within a year."

"And an agreement to use plaintiff's land as a stock yard, and run trains accordingly, in consideration of plaintiff erecting on his land cattle yards and pens, was held to be within the statute as it was a permanent arrangement, and it was contemplated that it should continue during the existence of the corporation, and it could not be performed within one year." Day v. New York C. R. Co., 31 Barb. 548; 51 N. Y. 583, Reversing 53 Barb. 250; 89 New York 616, affirming 22 Hun, 412."

Where the agreement of the defendant upon which suit was brought was not in any event to be performed within a year, it was held to be within the statute, although there were other stipulations providing for contingencies that would make plaintiff liable to defendant within a year and release the defendant," and in Wilson v. Ray, 13 Ind. 1, it was held:

"In this case plaintiff was to build a railroad and take pay in bonds, and defendant agreed to draw, accept and indorse paper; and plaintiff was to pay him one half of the amount over $.75 on the dollar the bonds sold for, and defendant was to pay plaintiff one half of the amount if bonds sold for less than $.75; and this suit was for that loss. The defense was that the bonds were not to be sold under sixteen months, and that the railroad could re-

deem the bonds by paying for the same and by issuing stock."

In the case of White v. Fitts, Supra, the court refers to another Maine case as follows: In Farwell v. Tillson, 76 Me., 227, the defendant had a government contract to furnish stone for the custom house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from Maine to Baltimore. The government contract required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year; and hence the contract was within the statute of frauds.

The presiding judge instructed the jury, inter alia, as follows:" . . . Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might be performed within a year? . . . . The subject-matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject-matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract that it was not to be performed within a year. So, also, a consideration of the circumstances and subject-matter might show that performance of it within a year would require such extraordinary methods, such extraordinary appliances or resources, as could not, by fair construction, be regarded as within the intention of the parties at the time when the contract was made; and the question is, considering the subject-matter, and the

situation of the parties as known to each other, and reading the contract in the light which these give, whether, by fair construction, it was within the understanding and intention of the parties, as expressed in the contract, that it might be performed within a year, or not." These instructions were held to be correct. In the opinion the court says: "The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject-matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the res about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was, by the contract, to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite "at such times and in such quantities as might from time to time be ordered," as was said in the ruling, did not require of him immediate performance, upon demand, of the whole contract."

See additional cases: Buhl v. Stephens, 84 Fed., 922, Johnson & Higgins v. Harper Transp. Co., 228 Fed., 730;

Adams-Booth Co. v. Reid, 112 Fed. 106; Long v. Cramer M. & P. Co., 155 Cal 402, 101 Pac., 297; Hagan v. McNary, 170 Cal 141, 148 Pac. 937, 1915 E. L. R. A., 562; Chadwick v. Morris, 170 Ill. App. 569; Williams v. Apoth. Hall Co., 80 Conn., 503, 69 Atl. 12.

The allegations of the second amended complaint are sufficient to show that it never could have been within the contemplation of the parties that there could be a performance of the alleged contract within one year. To develop such a vast tract of over 27,000 acres of timberland and market the timber is a project that is not within the range of possible performance within such time. Even if plaintiff had any right of recovery for services actually performed, the remedy would not be by action on the contract which was void.

Conceding for the purpose of that portion of our argument to follow, that the second amended complaint states a cause of action still the verdict for defendant in error was properly directed.

As stated by the trial court in passing on the motion to strike out the evidence of the alleged contract of August, 1917, "that contract is the one upon which this action is based and it is the one upon which this plaintiff must either stand or fall in this litigation."

In his first complaint, the plaintiff in error only sought to recover a commission of 5 % for the alleged procuring of a purchaser for certain lands of the defendant in error. (Tr. Rec. 5, 6 & 7.)

It will be observed that in that complaint it is alleged that the contract of employment to negotitate with Kerry,

was made in November, 1920, and refers to the same transaction as that referred to in paragraph 18 of the amended and second amended complaints, each of which contains 19 paragraphs and in each of which it is alleged in substance in paragraph 4, that immediately after the purchase of the timber lands mentioned in paragraph 3 and during the month of August, 1917, the defendant in error hired and employed the plaintiff in error to assist and aid in developing and marketing said property, and contracted to employ plaintiff in error to look after said property, to assist in marketing the timber thereon and in devising ways and means for securing the best possible returns from said property.

In the fifteen succeeding paragraphs are set out seventeen separate transactions in which plaintiff in error alleged that he rendered services and expended money at the request of defendant in error or its officers. These transactions may be summorized as follows:

(1) In paragraph V, plaintiff claims to have negotiated for and secured an option from St. Helens Timber Company and C. R. McCormick Company for the purchase of a logging railroad and equipment, road bed, rights of way, and terminal facilities at St. Helens, Oregon, for $300,000.

(2) In paragraph VI, he claims to have negotiated with Coleman H. Wheeler and associated companies for transportation facilities over the logging road of said Wheeler and associated companies.

(3) In paragraph VII, he claims to have negotiated with and secured from the Portland and Southwestern Railroad Company a proposal to purchase a half interest in

said railroad, equipment, and rights of way, for $140,000, with a further agreement to extend said railroad to Vernonia, Oregon, for which defendant company would bear one half the expense.

(4) In paragraph VIII, he claims to have negotiated with Mitsui & Company for the sale of 6,300 acres of the timberland of the defendant to Mitsui & Company.

(5) In paragraph IX, he claims to have secured for defendant a lease of the United Railroad Company for a period of 99 years at an annual rental of $45,000.

(6) In paragraph X, he claims to have negotiated with Norman R. Smith, of Hammond, Louisiana, and with his associates, F. W. Reimers and E. P. Denkman, for the sale to them of a portion of the timberland or of the capital stock of the defendant and finally *all* of the property of the defendant.

(7) In paragraph XI, he claims to have negotiated with E. S. Collins for the sale to him of a portion of the timberland or a portion of the capital stock of the defendant.

(8) In paragraph XII, he claims to have negotiated with the Long-Bell Company to sell said company a portion of the timberland or of the capital stock of the defendant, and submitted a proposal for the sale of half of defendant's property.

(9) In paragraph XIII, he claims to have negotiated with Coleman H. Wheeler for the sale of 6,300 acres of the timberlands of the defendant. to said Wheeler.

(10) In paragraph XIV, he claims to have negotiated with William Lee Owens for the sale of a portion of the timberlands of the defendant.

(11) In paragraph XV, he claims to have negotiated with Isaac T. Mann for the purpose of disposing of a portion of the stock or timberland of the defendant.

(12) In paragraph XVI, he claims to have negotiated with Stanley Dollar for the purpose of selling from one-fourth to four-tenths of the capital stock of the defendant.

(13) In paragraph XVII, he has three claims:

He claims to have negotiated with H. E. Noble for the purchase of eight million feet of timber for the defendant.

(14) In the same paragraph, he claims to have interviewed E. B. Waterman for the purpose of interesting him in the timberlands of the defendant.

(15) In the same paragraph, he claims to have negotiated with Jacob Mortenson for the purpose of interesting him in the capital stock or timberlands of the defendant.

(16) In paragraph XVIII, he claims to have negotiated with the Kerry Timber Company for a sale of 2,400 acres of timberland of the defendant, claiming for such services the sum of $39,117.45.

(17) In paragraph XIX, he claims to have negotiated a sale of all of the capital stock of the defendant to the Central Coal and Coke Company for $7,000,000, and claims a compensation for said services of $175,000.

In each of these paragraphs, it is alleged that the services were rendered and money expended under *the contract of August, 1917.*

The plaintiff in error filed a motion to strike the amended complaint, (which by stipulation of the parties and order of the court is made applicable to the second amended complaint) for the reason that it contained fifteen different and separate causes of action. This motion was resisted by plaintiff in error and denied by the court on the ground that the complaint stated but one cause of action based on the alleged general contract of hiring in August, 1917, and it was on this theory that the cause was tried. It follows, as said by the trial judge, that plaintiff in error must rely upon the alleged contract of August, 1917, and cannot rely upon any other contract expressed or implied.

The evident purpose of alleging that these services were all rendered under the contract of 1917, was to evade the provisions of section 808, of the statute of frauds, and sections 8309 to 8316, inclusive of Olson's Oregon Laws. Having adopted this theory of one indivisble contract plaintiff in error must recover upon that contract or fail in his action. If, therefore, plaintiff in error failed to prove the making of the contract, which he alleges was made in August, 1917, he failed to make out a case for the jury.

That plaintiff in error failed to prove the making of any contract between him and defendant in error in August, 1917, or at any time for that matter, is apparent from an examination of the record.

To prove the making of this alleged contract, plaintiff in error called Chas. T. Early, who was a director and the Vice President of defendant in error and who testified on that question as follows: (Transcript of Record, pp. 86-87).

CHARLES T. EARLY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION
(Questions by Mr. Wilbur)

Q. Where do you reside, Mr. Early?

A. Portland.

Q. How long have you lived there, Mr. Early?

A. About eight or nine years, I think.

Q. And during that time, what has been your occupation generally?

A. Up to the fall of 1921, I was with the Oregon Lum-Lumber Company, the Oregon-American Lumber Company and the P. A. & P. Railway Company.

Q. The Oregon Lumber Company that you refer to was one of the Eccles interests?

A. Yes, sir.

Q. In this state, and had lumber holdings in this state?

A. Yes, sir. (93)

Q. And the Oregon-American Lumber Company, you say you represent that company?

A. Yes, sir.

Q. In what capacity did you represent that company in this state?

A. I always understood I was general manager.

Mr. DeVine. In the light of that answer, I move the Court to strike it out.

Court. Let him state what he did.

Q. Were you a stockholder in the Oregon-American Lumber Co.?

A. Yes, sir.

Q. State whether or not you were on the Board of Directors.

A. I was.

Q. Were you a vice-president?

A. I am not certain about that, I think I was.

Q. From the time you went into this company in 1917, will you tell the jury what duties or acts you performed for this corporation with their knowledge and consent generally? (Tr. of Record, p. 139).

A. Well, immediately after the property was purchased, we sought the best methods of developing the property. The property was bought for develop (Tr. of Record p. 140) ment and not for holding or for speculation. It (135) had no transportation and I think about the first thing that was done was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad.

Q. Who made those arrangements with Mr. Bates, did you or who was it?

A. I did.

Q. I am coming to that a little bit later. Did you attend meetings of the corporation in Salt Lake City or Ogden?

A. Not in the early history of the company.

Q. When did you attend meetings there?

A. I think it was in 1920. I am not certain that I ever attended a meeting before 1920.

Q. Were you in conference with the officers prior to that time?

A. Yes, sir.

Q. What ones?

A. Well, particularly the President of the company, Mr. David C. Eccles.

Q. How often would you be in contact with Mr. Eccles?

A. Oh, he would come out and sometimes would (Tr. of Rec. p. 141) stay for a day or two, sometimes he would stay for a week.

Q. Was all the property of the corporation in timber holdings in this state?

A. I don't understand the question.

Q. Was all the timber holdings and property of that corporation in this state?

A. Yes, sir. (136).

Q. As far as you know, did any other officers of this corporation or director live in the state besides yourself?

A. No, sir.

Q. Who handled here the business of this company in the handling and operation of the property?

A. I did.

Q. I wish you would state—the Court has said that what it wants to know and what the jury wants to know, is what you did, Mr. Early, in your capacity in reference to the Oregon-American Lumber Companay. Can't you tell just exactly what you did?

A. Yes, there wasn't a great deal done just at that time. I looked after the taxes, hired a tax agent and hired cruisers when it was necessary to hire them, and arranged for fire patrol.

Q. In hiring people here, state whether or not you did that yourself here on your own authority for this company?

A. I did all that I have stated, yes, sir.

Q. Now the question you say of tax agent, what was that?

A. Well, we hired a man by the name of Mr. Starr, C. L. Starr, to look after our taxes in the (Tr. of Record p. 142) various counties. He represents most of the timber holders on the coast here, a very good man, and he had plenty of time to do it and I didn't.

Q. Now, what I want to get at, was he employed by you or was that referred to the company? Did you make that employment?

A. I hired him.

Q. Did the company subsequently learn of that or know of it, that you had hired Mr. Starr for tax matters?

A. Mr. Eccles knew of it. I don't know about the other people.

Q. State whether or not there was any objection.

A. No, sir.

Q. Mr. Starr was paid, was he?

A. Yes, sir.

Q. By whom?

A. Undoubtedly by the Oregon-American Lumber Company.

Mr. DeVine. That is a conclusion.

Court. State what you know about it. (137).

A. Well, he was paid, not only by the Oregon-American Lumber Company, but other Eccles interests that he represented. He represented the Oregon Lumber Co., the Sumpter Valley Railway and the Mt. Hood Railway.

Q. In handling their business, did you hire or employ attorneys at times?

A. Well, we used the same attorneys that we had had

for twenty years or more. Any business we had we went to them.

Q. That is the same attorneys. (Tr. of Record 143).

A. Huntington & Wilson.

Q. And any employment you had there for the Oregon-American Lumber Company, who made that employment or request for the attorneys?

A. Well, whatever business that came up that we had to consult an attorney, we took it there. I arranged with them as to fee.

Q. For the Oregon-American Lumber Company?

A. Yes, sir.

Q. State whether or not those were paid by the Oregon-American Lumber Company.

A. They undoubtedly were.

Q. Was any objection ever raised as far as that was concerned, to your handling that matter, employing attorneys to look after their affairs?

A. Not to my knowledge.

Q. Now, the question of any office help, or other things of that kind in handling their office here, who employed that help?

A. Well, I talked that over with the cashier, but he usually hired the help.

Q. But under whose general direction and supervision?

A. Well, under my supervision. If it was necessary to put on another man, or woman, why we discussed it and he was authorized to do it.

Q. Now, how many meetings did you attend, would you say, at Salt Lake or Ogden, where were those meetings held?

A. Ogden.

Q. How many stockholders' or directors' meetings did you attend?

A. I think about four.

Q. All of them at Ogden? (Tr. of Record p. 144).

A. All at Ogden, yes.

CROSS-EXAMINATION

Questions by Mr. DeVine. (Tr. of Record 165.)

Q. Mr. Early, where did this conversation take place in 1917, and in whose presence, if any person, with reference to this general contract of hiring?

A. I think it was in my office in the Northwestern Bank Building.

Q. How long was that after the organization of the Oregon-American Lumber Company?

A. I don't recall when it was organized.

Q. With what officers or with whom did you discuss this plan of development that embodied the hiring of Mr.

Bates in 1917, for all of these transactions which you have testified to?

A. No other officer, I think, except Mr. Eccles, until late in 1920. Then I discussed it with not only yourself, but all the other members of the Board.

Q. When you had this discussion then, with Mr. (Tr. of Record 166) Paul C. Bates, here in Portland, Oregon, in 1917, state if you will just what you said (155) to Mr. Bates about this employment.

A. I told him that we wanted to find the most practical way to develop the property, and there were various railroads leading towards it, and we either wanted to buy a road or build one, and my thought was to combine our timber with other timber and purchase a road that was already constructed, and extend it on to this timber.

Q. What else was said, now, aside from that about his contract of employment?

A. Well, it wasn't a very lengthy drawn out discussion. It wasn't necessary. He was simply told to go ahead and make these investigations from time to time, and that he would be paid for his time and his expenses.

Q. You say he was simply told. I am asking you to recite as nearly as you can the conversation. You stated the first portion of it being your theory; what did Mr. Bates then say to you?

A. What did Mr. Bates say to me?

Q. Yes.

A. Very well, he would be very glad to assist in any way that he could.

Q. What else, if anything, was said with reference to the scope of that employment that you were then making?

A. Nothing.

Q. Nothing else at all?

A. No.

Q. What expenditures of money did you then (Tr. of Record p. 166) and there authorize him to make for the Oregon-American Lumber Company?

A. I authorized him to make an indefinite amount.

Q. Did you at that time state to Mr. Bates what your authority was (156) to make this arrangement?

A. I think not.

Q. Did you at that time state to Mr. Bates what your position with the company was?

A. It wasn't necessary. Mr. Bates knew all about it.

Q. So there was nothing said in the conversation, in this general employment, with reference to your position with the company at all?

A. I think not.

Q. Did you at that time, Mr. Early, have any meeting with the directors of the company, in which you were given authority to make such a contract of employment?

A. I had had no meeting with the board.

Q. Did you at that time, or prior to the time that you have mentioned in 1920, and the fall of that year, ever have any meeting with the Board in which the Board took any action authorizing you to make this employment, or any employment?

A. I have already testified that I did not.

Q. Now did you in 1917 occupy a position with the company in which you reported to the Board of Directors at any time? (Tr. of Record p. 168).

A. Prior to 1917?

Q. No, in 1917.

A. No, sir; I think not.

Q. Did you in 1918?

A. I think not. (157).

Q. Did you in 1919?

A. I think not.

Q. Did you in 1920?

A. Yes.

Q. So from the beginning of this employment in 1917 down to 1920, late in 1920, you at no time ever directly or indirectly, or by writing made any report to the Board of Directors of the Oregon-American (Tr. of Record 169) Lumber Companay of any of the previous transactions that you have testified to here?

A. No, sir; I reported to the president.

Q. And as far as you personally are informed, you don't know whether the president of the corporation ever repeated, through writing or orally, any statements made by you in the so-called reports to the president, to his Board of Directors?

A. No, I don't know.

Q. During the entire time, Mr. Early, what salary were you placed upon by the Board of Directors of the Oregon-American Lumber Company?

A. I drew my salary from the Oregon Lumber Company and the Mount Hood Railway Company; I don't think I drew any from the Oregon-American.

Q. And at the time that you said, in 1917, that you made this general contract with Mr. Bates, you have now said to the Court, I take it, as nearly as you can recall, all that was said with reference to that employment?

A. Yes, sir.

Q. Was there anything said in that employment of selling the stock of the stockholders to the Central Coal & Coke Company (158) of Kansas City, Missouri, in 1917?

A. No, sir.

The articles of incorporation of Oregon-American Lumber Co., defendant in error, were introduced in evidence and show that the board of directors consisted of five members of which Early was one and that he was Vice-President; that meetings of the board were required to be held in the

state of Utah; (Tr. of Rec. 113) that the general office was at Ogden, Utah; (Tr. of Rec. 108-109) and that David C. Eccles was president and general manager. (Tr. of Rec. 113).

A copy of the articles of incorporation and other papers necessary to qualify defendant in error to do business in the state of Oregon were filed in Oregon on the 5th day of July, 1917, so that both Early and Bates were charged with notice of the fact that Early possessed no power or authority except such as pertained to his duties as a member of the board of directors and as Vice President (Tr. of Rec. 122-127).

Section 871, of the Compiled Laws of Utah, 1917, then and now in force is as follows:

> The corporate powers of the corporation shall be exercised by the board of directors, who, if the corporation be domestic and with franchises limited to the state, shall be stockholders of the company, and at least one of whom shall be a resident of this state, but in cases of consolidated corporations with franchises in two or more states, or states and territories, or of corporations engaged in interstate commerce, no qualifications of residence or stock ownership shall be necessary unless required by the articles of incorporation. The number of directors named in the agreement of incorporation as being sufficient to form a quorum for the transaction of business shall constitute a board, and every decision of a majority of the board so formed shall be valid as a corporate act. In all cases where it is not otherwise provided by the articles, all meetings of the

directors must be held at the principal office of the corporation in this state; but when so provided in the articles, meetings of the directors may be held, for the transaction of any business of the corporation, at such place outside of this state, or elsewhere within this state than at its principal office, as the directors may by resolution or by-laws, provide."

Section 869 in so far as it affects the question here involved provides:

> The corporation in its name shall have power to make all contracts necessary and proper to effect its purposes and conduct its authorized business; to sue and be sued; to have a seal, which it may alter at pleasure; to buy, use, mortgage, sell, or otherwise dispose of personal property; to buy, receive, use, sell, mortgage, lease or bond, or otherwise dispose of all such real estate as may be necessary, useful, or desirable for it to own, use or dispose of for its purposes; * * * *provided,* that, in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company.

The articles of incorporation make no provision for the sale of the property of the corporation.

It will be seen that by section 871 the corporate powers of the company are vested in and must be exercised by the board of directors. *And in the exercise of these powers, the board must act as a unit.*

Lockwitz vs. Pine Tree M. & M. Co. 37 Utah 349; 108 Pac. 1128.

In this Utah case, Mr. Justice Frick, speaking for the court, quotes with approval the following from 10 Cyc. 775.

> "The board of directors to whom authority to bind the corporation is committed, is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the Board sitting and consulting together in a body. Individual directors, or any of them, less than a quorum, have no authority as directors, to bind the corporation, and this is equally the rule although the director who assumes to do so may own a majority of the shares."

And in the course of the opinion, speaking of the powers of the president it is said.

> "Under our Statute therefore, the President, as such, of a corporation, has ordinarily only the powers of a director, or such as may be directly conferred upon him by the Board of Directors."

It is further held in that case that, where the president and secretary of a corporation entered into an option contract for the sale of corporate property for a fixed price payable in installments, pursuant to the authority of the board of directors to the president and secretary to contract for the sale of the property for a specified price, the president alone had no authority to extend the time of the

payment of any installment; the contract making time of the essence.

In Copper King Mining Co. v. Hansen, 52 Utah 605, 176 Pac. 623 at 625, it is said:

> "It has been determined by this court that under Comp. Laws Utah 1907, Sec. 324, (same as Sec. 871 Comp. Laws of Utah 1917) the president of a corporation ordinarily has only the powers of a director, or such additional powers as may be directly conferred upon him by the board of directors. Lockwitz v. Mine & Milling Co., 37 Utah, 349, at page 355, 108 Pac. 1128, 3 Cook on Corp. (7th Ed.) par. 716, p. 2473. While it is true the president or general manager of a corporation sometimes exercises extensive powers in the executive management of business he is nevertheless acting all the time under the express or implied authority of the directors, who are the real managers of the corporation. He has no implied authority to sell treasury stock. Camden Land Co. v. Lewis, 101 Me. 98, 63 Atl. at 531."

These decisions from the Supreme Court of the State of Utah, cover every phase of this case, including the claim by plaintiff in error of a commission for the sale of capital stock. And since defendant in error is a Utah Corporation deriving all its powers from the laws of that State, these decisions are controlling upon all of the courts.

If we turn to the decisions of the State of Oregon, where it is claimed the contract of August, 1917, was made, they are no less conclusive against the plaintiff in error.

In Crawford v. Albany Ice Co., 36 Or. Rep., page 537. 60 Pac. 14, it is said:

"No by-law or resolution was ever adopted by the corporation authorizing its president and secretary or any one else to make and execute promissory notes for or in its behalf; but it is admitted that the note sued on was signed by the persons whose names are affixed thereto, and that they were, respectively, the president and secretary of the defendant, and constituted two of the five members composing its board of directors. It is elementary law that the president and secretary of a corporation, as such, have no power to bind the corporation by the execution of promissory notes or other contracts, but such authority 'must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiesence or ratification on the part of the corporation, whose powers, under our law, are exercised by the directors.' Luse v. Isthmus Transit Ry. Co., 6 Or. 125, 131; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac., 1017 and 45 Pac., 252; Lyndon Mill Co. v. Lyndon Literary & Biblical Inst., 63 Vt. 581 (22 Atl. 575); People's Bank of New York v. St. Anthony's Catholic Church, 109 N. Y. 512 (17 N. E. 408); Leggett v. New Jersey Mfg. & Bank Co. 1 N. J. Eq. 541, 23 Am. Dec. 728; Dabney v. Stevens, 40 How. Prac. 341."

See also:

Wilson v. Investment Co., 80 Or. 253, 156 Pac. 249.

Harding v. Oregon-Idaho Co., 57 Or. 34, 110 Pac. 412.

Utah Idaho Sugar Co. v. Lewis, 95 Or. 224, 187 Pac. 590.

Bell & Co. v. Voght, 87 Or., 102, 168 Pac. 724.

DIRECTORS COULD NOT ABANDON THEIR SWORN DUTIES

Considering the importance and magnitude of the authority and functions assumed by Vice-President Early in entering into this alleged contract, involving the sale in one of the items of the whole of the property of the defendant corporation, as shown in paragraph X of the plaintiff's second amended complaint in which plaintiff alleges that he was negotiating for a period of two and one-half years with Norman R. Smith, F. W. Reimers and E. P. Denkman, "for the sale of an interest in or a portion of said property and finally for the sale of *all* of said property," and in paragraph XIX of said complaint where plaintiff claims he was negotiating for the sale and finally consummated the same to the Central Coal and Coke Company of "*all* of the capital stock of this defendant corporation" and considering the other items specified, consisting of the purchase and leasing of railroads, the sale and purchase of large tracts of timberland, and the sale of the capital stock of the company, each involving millions of dollars, we may well say that never in the history of corporate litigation can there be found a case involving such arrogation and assumption of power on the part of a Vice-President. We go further and make the emphatic and challenging statement that no board of directors of any corporation would be permitted under the law to make such a complete delegation and surrender of their duties and functions.

Directors of a corporation before entering upon the performance of their duties subscribe to an oath that they will faithfully perform their duties, and they owe a duty as trustees for the stockholders to give a conscientious

care and supervision to the business and affairs of the corporation. True they may appoint agents to perform ministerial duties, sometimes requiring the exercise of considerable discretion, but in the administration of the large affairs of the corporation, in those affairs upon which the success, prosperity and oftentimes the very existence of the corporation depend, the directors must exercise personal care and supervision in the form of board action and in the discharge of these higher and more important duties involving the highest exercise of discretion and judgment, there can be no delegation and no appropriation of their powers. If it were otherwise, there would be oftentimes a one-man rule, where it was intended by the stockholders and by the law that the several minds of the directors should debate and deliberate, and the result would be wreck, ruin and disaster from lack of that composite judgment and wisdom which would flow from the concerted action of the board.

On this feature of the necessity of the action of the Board of Directors, we invite the attention of the Court to the case of Ames v. Goldfield Merger Mines Co., 227 Federal, 292, in which that Court set forth with admirable clearness and force the functions and duties of directors of a company:

> "The issue is: Have the directors of this company abandoned the company? Have they turned the management of its business over to others, and is the business of the Merger Company now being administered by the officers or employes of other companies, whose business is or may develop antagonistic to the best interests of the Merger Com-

pany? The stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented which involves any interest of the company, in conformity to the oath which they have subscribed. They have a right to have the individual viewpoint of the several directors expressed at a conference, for the purpose of obtaining the exchange view of the several persons in arriving at conclusions after deliberate consideration of any issue. It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting, and a majority of the individual expressions be the action of the board. The law believes that the greatest wisdom results from conference and exchange of individual views, and it is for that reason that the law requires the united wisdom of a majority of the several members of the board in determining the business of a corporation, and will not permit the business and concerns of a corporation to be delegated to any officers or men, however capable, or however high their standard for integrity and honesty may be, and that fraud will be implied upon the delegation of such power and right, and the exercise thereof by men who may be the controlling stockholders, even though in their own conscience, they may believe that everything has been done to the very best interests of the concern."

In 10 Cyc., page 770, is the following:

"DELEGATION OF THEIR POWERS BY DIRECTORS. General Rule that Directors cannot

Delegate Discretionary Powers. The Directors of a corporation cannot as a general rule delegate their discretionary powers to one or more of their number, unless (1) the charter, governing statute, by-law or other valid governing custom empowers them so to do; or (2) there is an instrument permitting them so to do of such public notoriety that persons contracting with the corporation may be presumed to have knowledge of it"; citing many cases.

In 10 Cyc., page 771, is the following:

"WHAT POWERS MAY NOT BE DELEGATED BY DIRECTORS. The general rule is that the power to alien the real property of a corporation in any manner except in the ordinary course of business, whether by sale, mortgage, or lease, is a discretionary power which the directors of the corporation cannot delegate to another; and this is so of the power to allot the unsubscribed shares of the corporation, which power has been delegated in the board of directors; and so of the power of making assessments upon shares of the capital stock."

Again, in 21 Ency. Law (2nd Edition) p. 856, under title of "Officers of Corporation" is found the following:

"DELEGATION OF AUTHORITY. In General. Employment of Agents. In accordance with the general law of agency, officers and agents of corporations cannot delegate powers which involve the exercise of judgment and discretion, and which it is the intention of the corporation should be exercised by them in person. But officers and agents charged with the general management of the corporate affairs usually have express or implied authority to

delegate to other agents appointed by them the power to manage the details of the business although this may involve the exercise of discretion"; citing cases.

In Tempel v. Dodge, 89 Texas, 68, 32 S. W. 514, 33 S. W. 222, the court said:

"Undoubtedly the Board of Directors can appoint agents, whether in form of committees or as a single agent, to transact the ordinary business of the corporation; but we believe the rule is well settled by authority and sustained by sound principle that a board of directors cannot confer upon others the powers to discharge imposed upon them which involve the exercise of judgment and discretion, except in the transaction of the ordinary business of the corporation, unless authorized by the charter." Citing:

Thompson Corp., Sec. 3944 et seq., Green's Brice Ultra Vires, 490, 492;

Tippets v. Walker, 4 Mass. 595;
Weidenfeld v. Rd. Co., 48 Fed. 615.

In re County Palatine Loan and Discount Company, L. R. 9 Ch. App. Cas. 691, it was held that the directors could not delegate to the manager of a corporation authority to purchase shares of the company.

See also In re London, etc. Bank, L. R. 3 Ch. App. Cases 651.

In Utah, the home of the creation of the defendant company, it was held in Flagstaff Silver Mining Co. v. Patrick, 2 Utah, 304, and Davis v. Flagstaff Silver Mining Co.,

2 Utah, 74, that the directors cannot surrender or delegate the entire management and control of the corporate business to a creditor, to be exercised until the payment of his claim.

And in Oregon, in which state the very extensive interests in timberlands of the defendant company were located, it was held in Patterson v. Smelting etc. Works, 35 Or. Rep. 105, 56 Pac. 407, as follows:

> "Under the maxim, '*Delegatus non potest delegare,* if the exercise of any measure of discretion or judgment was necessary on the part of the board of directors, in conducting the sale of the corporate property, the authority to dispose of the same by a less number than all the members of the board could not be conferred, except by the stockholders, in whom the power under the statute is lodged; 1 Am. & Eng. Enc. Law (2nd Ed.) 972; Loeb v. Drakeford, 75 Ala. 464. And, if the board did not possess the power to authorize the president and secretary to conduct the sale, no ratification by that body, such as a confirmation of the sale, could give validity to an act which the board was incapable of authorizing before it was performed. But where the act to be accomplished is ministerial only, and relates to the performance of a private duty, a less number than those to whom the power has been delegated may properly execute it: Saltmarsh v. Spaulding, 147 Mass., 224 (17 N. E. 316)."

This same doctrine is upheld in Thompson on Corporations, Sec. 3951.

In Fletcher on Corporations, Vol. 3, p. 3148, Secs. 1953 and 1954.

In Clark & Marshall on Corporations, p. 22-32.
See also:

Johnson v. Sage, 11 Idaho 758, 44 Pac. 641;
Gillio v. Bailey, 21 N. H. 149;
Ins. Co. v. Chase, 56 N. H. 341;
Portland Female Orphan Asylum v. Johnson, 43 Me. 180;
Bliss v. Keweah Canal & Irr. Co., 4 Pac. 507;
Caldwell v. Mutual Reserve Fund Life Assn., 53 App. Div. 245; 65 N. Y. Supp. 826;
Queen v. Second Ave. Ry. Co., 44 Howard Pr. (N. Y.) 281.

Silver Hook Road Co. v. Green, 12 R. I., 164.

It is manifest that, under these authorities, even the board of directors could not have bound the corporation by such an extraordinary contract as the plaintiff in error alleges he made and such as Early testifies he entered into on behalf of defendant in error, with him—a contract which, according to the allegations of the second amended complaint, virtually placed the entire management, control, and disposition of property worth millions of dollars in the hands of plaintiff in error, a stranger to the board of directors, and which authorized him to make unlimited expenditures on behalf of defendant in error, and to involve it in enormous obligations. And certainly a mere director or Vice-President or even a general manager has no such unlimited power. Any rule that would permit such officers or agents to bind the corporation by such extraordinary contracts, would place the corporation and its stockholders at the mercy of an unscrupulous officer and conspirator. Fortunately for honest stockholders,

no such rule of law prevails in this or any other civilized country.

Our contention is that the law has been conclusively and generally established in both State and Federal Courts that a general manager, or a president, or vice-president, although invested with extensive powers to employ and discharge employees and generally to conduct and transact the usual and sometimes called "all kinds of business" for a corporation, still is not empowered to enter into a contract for the sale, purchase, lease or other disposition of its property or empowered to sell its capital stock, or to make unusual and extraordinary contracts of the nature of plaintiff's alleged contract of hiring.

In plaintiff's alleged services under his alleged contract, there were, as we have before mentioned, seventeen different items or specifications. Of these, fourteen were negotiations for the sale or purchase of lands, (including in the alternative five items for the sale of stock and including the purchase of interests in two logging railroads with rights of way); seven items were for the sale of capital stock, (including five in the alternative with timberlands); and two leases of railroads. One of these items, as mentioned before, was for negotiations for the sale of *all* the defendant's property, and another was a claim for the sale of *all* of its capital stock. All of these items concern transactions of a magnitude which would involve the defendant company in some cases in enormous outlays and financial obligations. And there is no evidence in the record that any of these alleged transactions were reported or were known to the board of directors except the one with Ford

and the Kerry Timber Company, in which Bates represented Ford and the Timber Company.

In this case it has been conclusively established by the evidence that Charles T. Early, who made the alleged contract with plaintiff in error, was but vice president at the time of the alleged making of the contract, in August, 1917, but even if invested with the full powers of a general manager, or if acting with the acquiescence and countenance of the general manager, he would not be empowered to make the contract alleged by the plaintiff. An inspection of the articles of incorporation of this company shows that David C. Eccles was president and general manager and Charles T. Early was vice-president of this corporation, at the time this contract was alleged to be entered into, to-wit, August, 1917. (See Article XI of said Articles of Incorporation Tr. of Record 95, 96). The duties and powers of the General Manager are set forth in Article VII on page 93 of the Tr. of Record, and is as follows:

> "The Board of Directors may appoint one of their own number, or any other person, General Manager of the corporation, and the duties of the General Manager shall be to look after and superintend all of the affairs of the company, and subject to such regulations as may be imposed by the Board of Directors, to employ all assistance and labor necessary therefor, contract for the compensation of all employees, and discharge any person so employed. The General Manager shall make report to the Board of Directors annually, or oftener if required so to do, setting forth in detail the results of the operations under his charge, together with any suggestions looking to the improvement and

betterment of the conditions of the Company, and to perform such other duties as the Board of Directors shall require."

It will be seen that the prescribed duties of the General Manager placed him entirely under the orders of the board of directors, and there was no thought of permitting him, much less, the vice-president, to sell the corporate property or involve it in the purchase or construction or leasing of railroads; or unlimited expenditures of corporate money.

And the compensation of employees was to be fixed by the General Manager subject to directions of the board of directors. Moreover, the General Manager was required to make annual reports to the board of directors setting forth the result of operations under his charge. Early testified that he "always understood that he was general manager," but admitted that he never made any report to the board of directors, until he was called to Ogden, in the fall of 1920, when a meeting of the board was held and the affairs of the company discussed. (See pages 168 and 169 of printed record). If Early thought he was general manager it is strange that he made no report, as required by the articles of incorporation.

In the instant case there can be no question of *apparent* authority involved, for it appears by the allegations of the complaint of plaintiff in error that this alleged contract of August, 1917, was entered into immediately after defendant in error acquired these timber lands, and by the testimony of Early (Rec. 139-140) that the very first business that was done was to arrange with Mr. Bates to negotiate

for the purchase of a railroad; and in the complaint it is alleged this was done on the 6th day of August, 1917, (Rec. 51.) It is therefore absurd to say that Early had been clothed with apparent authority to enter into the alleged or any contract on behalf of defendant in error.

The judge of the trial court, in passing on the motion to strike out the evidence of the alleged contract on the ground that no authority on the part of Early to make the contract was shown, made a very clear and lucid statement of the law on this subject as follows:

> "More than that, I have examined this complaint with a great deal of care and with possibly one exception the services that are sought to be recovered in this case were either for contracts relating to the purchase or lease of property by this company, the sale of its stock or sale of its property, and even a general manager would have no authority to enter into a contract of that kind and bind his company, and if he had no authority to do it, he certainly had no authority to employ another to act for him.
>
> So that as the record now stands the evidence is not sufficient, in my judgment, to show that Mr. Early had any authority to bind the company by the particular contract upon which this action is based.
>
> These transactions that occurred later, the railroad transaction and some of these others, if they were ratified, subsequently ratified by the company, might constitute a separate cause of action but that is not the one upon which this action is prosecuted, and so the court is of the opinion that the motion made is well taken and that the evidence should be stricken out."

This statement is abundantly supported by both text writers and adjudicated cases.

We have already called attention to the provisions of the laws of Utah under which defendant in error was incorporated and to some decisions of the Supreme Court of that State holding that the corporate powers of corporations formed under the laws of that state, are vested in and must be exercised by the board of directors acting as a unit.

We now invite attention to some of the authorities, which are almost innumerable, which fully sustain the doctrine of these cases.

We arrange these authorities under four different heads, viz:

1—Those pertaining to real estate transactions.

2—Those pertaining to the sale of stocks.

3—Those involving extraordinary contracts.

4—Those involving miscellaneous matters.

POWERS CONCERNING INTERESTS IN LANDS AND OTHER PROPERTY

Elk Valley Coal Co. vs. Thompson 150 Ky. 614, 150 S. W. 817-820, was a case which arose out of a written contract made in the name of the company, through J. M. Thompson, its general manager, agreeing to pay one H. C. Thompson $8,000,00 for services rendered in the event one Anderson Hogg purchased the coal property of the company which was subsequently purchased by said Hogg. The Court said:

"Coming now to discuss the propositions stated, the first one is: Did J. M. Thompson have authority under the order or resolution appointing him general manager to bind the corporation by the paper he executed to H. C. Thompson.

"It will be observed that by the order or resolution appointing J. M. Thompson general manager he was "to have control and management of the business of this company, subject to the approval of the president or vice-president with the right to employ and discharge employes and transact all kinds of business for said company," and it is argued that this resolution conferred upon J. M. Thompson ample authority to bind the corporation by the contract he made with H. C. Thompson. It is true the resolution is broadly worded and conferred upon J. M. Thompson large authority, but we think it was not intended to and did not invest him with power to bind the corporation even with the approval and direction of the president or vice-president in the execution of a contract of the character made with H. C. Thompson. The resolution was adopted about a month after the corporation was organized, and there is not the slightest showing that it was contemplated by any of the officers or directors of the corporation at the time that its property would be sold, or that it was intended by this resolution to confer upon Thompson the right to sell it or to bind the corporation in any matters not connected with the transacting of the business the corporation was organized to carry on *********. It would be giving to this resolution a meaning not intended and not fairly implied by its reading to say that it conferred upon Thompson authority to sell the property of the corporation or to bind it in any manner

except in connection with the business it was engaged in ********* and shows very clearly that his power was confined to matters connected with the mining of coal.

"This being our construction of the resolution, it conferred no authority whatever upon J. M. Thompson to bind the corporation by the contract he made with H. C. Thompson and as J. M. Thompson had no authority to bind the company by the contract, neither could the president or vice-president bind the corporation by ratifying or approving the contract. The power of direction and approval vested in the president or vice-president did not go any further than to give them the right to approve anything that J. M. Thompson was authorized by the resolution to do *********. As the resolution did not authorize J. M. Thompson to sell the property of the corporation it necessarily follows that it did not authorize him to agree that any person who sold it would be compensated. As the corporation would not have been bound by his act in selling the property, neither can it be made liable for his act in agreeing to compensate the party who negotiated the sale.

Cook on corporations, Vol. 2, Sec. 719.

Thompson on corporations, Vol. 2, Sec. 1576."

We invite especial attention to the statement above quoted that if the manager could not sell he could not bind the company to compensate a party for negotiating a sale.

Integrity Mining & Milling Co. vs. Moon, 130 Mo. App 627, 109 S. W. 1057 is a strong case on the question of the powers and authority of presidents and general managers to dispose of the property and assets of a corporation. The case arose in an action to enjoin a trespass on real prop-

erty. The defendants claimed their rights by virtue of the permit granted by the president and general manager of the plaintiff. The Court in part says:

> "The defendants justify their rights to mine the lots under and by virtue of said permit issued to them by Myers, plaintiff's president and general manager. But plaintiff insists that said Myers had no authority to issue said permit and that consequently it is a nullity and no justification of defendant's trespass. The permit was issued by Myers without any authority from plaintiff's board of didectors.
>
> "Section 1320, Revised Statutes 1899, provides that the property and business of a corporation shall be controlled by a board of directors. The statute does not mean that every business act performed shall be in pursuance of an order of the directors of the corporation. It contemplates that the directors shall appoint officers and agents to control the business affairs of the corporation and that the acts of such officers and agents while acting within the scope of their authority shall be taken as the act of the corporation itself. Myers as president and general manager of the plaintiff was clothed with full authority to perform all the duties pertaining to the two offices in the general management of the business and control of all inferior officers and agents in the performance of their duties. He had general charge of the corporation property and could perform all acts necessary to its keeping and preservation, but there were things he could not do. He could not borrow money on the credit of his company nor sell its property or dispose of its assets. (Feld vs. Investment Co. 123 Mo. 603, 27 S. W. 635 Fergusen vs. Venice Transfer Co. 79 Mo. App 352.)

"Defendants have cited certain authorities to the effect that when an officer of a corporation has been put in control of its affairs and permitted to manage and conduct its business, his authority to bind the corporation will be inferred from the ostensible authority conferred upon him. (citing cases.) These cases refer to the general management of the affairs of a corporation and have no application to this case. The fact that Myers was the chief officer of the corporation and its general manager did confer such ostensible authority as would bind the corporation to third parties who dealt with him in the general management of its business but no further. To hold otherwise would place in jeopardy the property of every corporation in the land. ALL WOULD BE AT THE MERCY OF THEIR PRESIDENTS AND GENERAL MANAGERS. (The emphasis is ours). We hold that in order to effectuate a sale of the property of a corporation or its transfer to another corporation the authority of its directors must be had."

Citing 1 Beach on Private corporations, Vol 1 par. 202 as giving the proper rule.

In Chicago & Northwestern Railway company vs. James, 22 Wis. 187, it was held that under principles which usually govern such corporations, neither a director nor vice-president of a railway company is empowered to bind it by his acts, such as appointing agents to protect its lands or to sell the lands or timber. The Court passing on the authority of vice-president, said:

"And so, too, of the vice-president, we consider his duty in addition to that imposed upon him as director to preside at meetings of the board in the ab-

sence of the president. These principles with regard to the general powers and duties of such officers, are elementary.

In Walworth County Bank vs. Farmers Loan & Trust Co. 14 Wis. 325, it was held by this Court that the president of a railroad company had no power, by virture of his office merely, to make a sale of the property of the company, and his is certainly an office of more dignity and importance than that of vice-presient or director. See that case and the authorities there cited and also Angell & Ames on Corporations, Sections 299 to 302, inclusive."

Morgan vs. Washburn Lumber Co., 180 S. W. 911 (Tex. Civil App.) is a case wherein plaintiff sought specific performance, or in lieu damages for breach of contract, on a written agreement made and signed by the plaintiff and one Stephenson, president and general manager of the sawmill business of the Lumber company for the sale of 640 acres of land of the company. The Court held:

"That it was not shown that as such president he was authorized to bind the company by a contract to sell its lands. On the contrary it was shown that under the laws of Louisiana in the absence, as was the case, of authority conferred upon him by the company's board of directors he was without power, merely because he was the president of the company, to bind it by such contract. And such is the rule in this state (citing several cases from Texas.) It was not pretended that he was the agent of the company in any other way then as its president and general manager of its sawmill business."

Effort was then made to show that Stephenson was held out by the company as having authority to make contracts binding on it to sell its lands. One Huttnell testified in effect (the testimony being set out in full in the case) that Stephensen with one Mr. Leidigh agreed to sell him a portion of its timber land, and that afterwards, the company made him a deed to the land. On cross examination he said, "I did not get the deed then. It was through the unanimous vote of the board of directors that I got the deed." The court held there was no estoppel on the company's part to deny holding out Stephenson as its agent authorized to bind it by a contract to sell its timber. In the instant case there can neither be estoppel nor ratification as the board of directors had no knowledge of the alleged contract nor of the alleged activities of Bates.

Twelfth St. Market Co. vs. Jackson, 102 Pa St. 269, was a case in which the president of a corporation who had "the general charge and direction of the business of the company, as well as matters connected with the interests and objects of the company" employed a broker to procure a party to pay off an existing ground rent upon the company's property. After such party had been procured the president employed a second broker to notify the original holders to produce the ground rent, or it would be extinguished. The latter agreed to the reduction, and the matter was then brought before the board of managers and ratified. Nothing was said about the employment of the first broker or his commission, and when he brought suit the lower Court permitted the question of ratification to go to the jury. The Supreme Court reversed the case, saying that as the president had no authority it was error to submit the question of

ratification to jury, as there was no evidence that the matter had been submitted to the board, or that they assented to the alleged acts of the president in employing the broker.

In Jackson Brewing Co. vs. Canton—118 La 823, 43 So. 454, it was held:

> "Where the charter of a corporation provides that all its corporate business is to be managed by a board of directors, and that the board shall define the duties of the President and other officers. AND IT DOES NOT APPEAR THAT THE DUTIES OF THE PRESIDENT OR SECRETARY HAVE BEEN DEFINED, (emphasis ours) those officers have no authority to bind the corporation by the employment of a broker for the purchase of real estate, and in negotiations between the broker (assuming by virtue of such employment to represent the corporation and the owner of the property) the corporation is not represented, hence no contract can result which can bind it. Citing Dodge vs.Hopkins, 14 Wis. 687.
>
> Cowen vs. Curran 216 Ill. 598, 75 N. E. 322, Clark & Marshall p. 953.

In Groeltz vs, Armstrong Real Estate Co. 115 Iowa 602, 89 N. W. 21, it was held that where the directors of a corporation give an option to the plaintiff to purchase certain real estate, and give its president authority in pursuance thereof to execute a conveyance, the president has no authority to make a new arrangement with the plaintiff agreeing to pay him a commission for surrendering his option and introducing another party who purchased the property, and that the acceptance of the price from the new party introduced by the plaintiff was not a ratification. The

case held further the question as to the authority of the president was for the court and not for the jury.

On the question that the acceptance of the price was not a ratification the case of Market Co. vs. Jackson, 102 Pa. 269 Supra was cited with approval.

Ansley Land Co. Limited vs. H. Weston Lumber Co. 152 Fed. 842 brought by the Ansley Co. was a suit to cancel a deed of certain real estate made by its president, M. E. Ansley. The court in the course if its opinion said:

> "These extracts from Mr. Weston's testimony show that he thoroughly understood the general rule of law to be AS IT IS that Mr. Ansley by virtue of his position as president of complainant company had no authority to sell the land or timber belonging to the complainant company. He concluded the bargain with Mr. Ansley under the belief that Mr. Ansley was or would be authorized to sell the timber in question by a resolution of the board of directors of the complainant company."

Then follows remarks on a supposed resolution of the directors, which it was shown was not passed. The court concludes that the deed executed by President Ansley was null, saying:

> "He was not authorized by any special or general resolution of the board of directors and it was not shown that it was the custom of the company to permit him to make sales of the lands of the company without authority from the board of directors."

In re Cullian Fruit & Produce Assn. 155 Fed. on page 375, it was held:

> "It is a generally recognized principle of law that the president of a corporation or its general manager, without authority of the board of directors, cannot make a valid conveyance or assignment of the property of a corporation." (Citing a number of authorities.)

In Johnson vs. Sage, 4 Idaho 758, 44 Pac. 641, the first point in the Syllabus reads:

> "The president and secretary of a mining corporation have no power to appoint an agent or attorney in fact to manage, control, sell and transfer the property of the corporation without being themselves authorized so to do by order or resolution of the board of directors duly adopted by said board."

The second reads as follows:

> "A power of attorney to manage, control and lease the property of a mining corporation, does not authorize an attorney in fact or agent to sell and transfer the property of the corporation either in trust or absolutely."

In Kansas City Hay Press Co. vs. Devol et. al., 72 Fed. 717, the court held that where the by-laws of a company provided that the board of directors should have the general management of the officers of the corporation and the president should execute and acknowledge instruments requiring acknowledgment, the president was without authority to make an assignment of a patent. This case cites with approval Titus vs. Railroad Co., 37 N. J. L. 102 and quotes the following language therefrom:

> "The affairs of corporate bodies are within the exclusive control of their board of directors from

whom authority to dispose of its assets must be derived."

And further cites in support, Bank vs. Dunn 6 Pet. 51, U. S. vs. City Bank of Columbus, 21 How. 356, Railway Co. vs. Allerton, 18 Wall 233, Walworth County Bank v. Farmers' Loan and Trust Co., 14 Wis. 357, Hyde v. Larkin, 35 Mo. App. 365.

In Brown vs. Bass, 132 Ga. 41, 63 S. E. 788, the action was for rents arising out of a transfer of a lease and sale of the Sanford farm, the plaintiff claiming to have the contract of transfer through a contract made by the former owner, Union Life Insurance Company, through its president and treasurer, the latter of whom was the "active head of the company." The defendant objected to the introduction of the contract of transfer signed by its officers, there being no proof of their authority to execute the same. The court sustained the objection, and a nonsuit was granted, the court saying:

> "The transfer was tendered in evidence as an act of the company. The objection called for proof of such act, and we are clear that merely showing that two agents of the company, its president and treasurer, performed the act, was not without more sufficient proof that it was the company's act." The Court cites a number of authorities in support of its ruling.

In American Rio Grande & Irrigation Co. vs. Mercedes P. Co. 155 S. W. (Texas Civil Appeals) p. 286 at p. 294 the Court approves Gashwiler vs. Willis 53 Cal. 11, 91 Am. Dec. 607, to the effect that the rule is firmly established in this

country that the powers of a corporation can be exercised only by its board of directors, *regularly assembled in a directors' meeting; that all of the directors acting separately have no power to sell or authorize the sale of corporate property.* Further on in this case the Court says:

> "No circumstances short of actual notice of express authority would justify purchasers of land to assume that a general manager of a corporation had authority to sell the land of the company. A general manager can be presumed to have such authority as is necessarily incident or customarily exercised by officers of like position." Citing Thompson on Corp. Sec. 4871-4887 and several cases.

In St. Vincent College vs. Hallett, 201 Fed. 471, where the by-laws of a college corporation placed the management in the hands of five trustees and declared no purchase of real estate, deed, mortgage or note should be made unless authorized by a resolution, and said by-law further provided that the president should execute all instruments about the business of the college and in general should exercise all authority and perform all acts usually exercised by presiding officers of colleges, it was held that the by-laws should be construed as merely designating the president to perform ministerial acts and did not authorize him to bind the corporation by the execution of notes as evidence of loans not authorized by the trustees.

In Franklin vs. Havalena Mining Co., 16 Ariz., 200, 141 Pac., 727, it is held that neither the president, secretary nor general manager of the corporation has power, merely by virtue of his office, to lease or sell the property of the

corporation and such lease, when not ratified by the Board of Directors, is not binding.

That case further holds, quoting from Cook on Corporations (6th Edition) §716, as follows:

> "The President of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management."

Also:

> "The Secretary of a corporation has no power, merely as secretary of the company, to make contracts for it." Cook on Corporations, §717.

The Court further holds as follows:

> "A general manager of a corporation has no power merely by virtue of his office to do 'anything out of the usual course of business' of his company."

It quotes with approval from Cook on Corporations, § 719, as follows:

> "The general manager does not displace them (directors), and a person dealing with the corporation is bound to take notice of that fact."

The Court proceeds:

> "None of the officers who signed the contract of August 5th, nor all of them together, could bind the corporation merely because they were officers. The instrument was not the act and deed of the corporation."

In McKibbin vs. Hulton D. & F. Co., 227 Pa. St. 153, 75 Atl. 1038, it is held that a contract in writing for the pur-

chase of real estate made by the president of the corporation in the company's name, without authority, and contrary to the by-laws and without the knowledge of the directors was invalid, and no ratification could be inferred from the fact the company entered into possession of the real estate under a lease which was separate from the contract of sale, and had paid rent under said lease.

No presumption of authority to sell lands of a corporation arises in favor of the general manager of a corporation. Hurlburt vs. Gainer, 45 Tex. Civ. App. 588, 103 S. W. 409.

In the Conqueror, etc. Co. vs. Ashton, 39 Colo. 133, 90 Pac. 1124, the first, second, third and fourth paragraphs of the syllabus are as follows:

> "Where the board of directors of a corporation is vested with the general management of its affairs, a person doing business with an alleged agent of the company, is bound to take notice of the extent of such agent's authority. Page 138.
>
> "The power to make a contract binding a corporation to pay a certain sum to lessees for surrender of their rights under an alleged lease is not incidental to the office of the president and general manager, and such a contract is not binding on the corporation in the absence of evidence of authority to make it or of its ratification by the company. Page 138."
>
> "A contract made without authority by the president and general manager of a corporation cannot be ratified by the board of directors unless the

board has full and complete knowledge of its terms and conditions. Page 138.

"An agreement by the owner of property to pay a certain sum to an alleged lessee for the surrender of his rights under a void lease is not supported by a valuable consideration. Page 139."

The case of Extension etc. Co. vs. Skinner, 28 Colo. 237, 64 Pac. 198, is also directly in point. There it was held that the directors could act only as a board, and not individually and that a contract made by one of the directors of the corporation who was also Secretary and Treasurer, whereby he agreed on behalf of the Corporation to pay a commission for the sale of its mining property, was not binding on the company, and this, although the president had promoted the sale.

Caddy Oil Co. vs. Sommer (Ky.) 218 S. W. 288, was a case in which the president of the corporation made a contract with a broker by which the broker was to sell the oil lease of the corporation. In the course of the opinion it was stated:

"Sec. 551 Ky. Stats., provides in whom the governing power of a corporation is vested in this state, and that is in its board of directors, of which each corporation shall not have less than three, and a majority of whom shall constitute a quorum with power to transact business. The board of directors cannot bind the corporation except when acting as a body, and agreements between individual members of the board are not binding upon the corporation. American Nail Co. vs. Gedge, 96 Ky. 513, 29 S. W. 353, 16 Ky. Law Rep. 663; Mora-

wetz on Corporations, p. 88; Beach, Sec. 224. Hence, in determining whether an officer or other agent of a corporation has been vested with binding authority by the corporation to act for it in a matter, there must be express authority found for the action of the officer in the by-laws, resolutions, or acts of the board of directors, or else the act must appear within the scope of the apparent authority with which the board of directors has invested him, by the manner in which the officer has been permitted by it, with knowledge and approval of or acquiescence in his acts, in the transaction of its business. This apparent authority is, however, limited and governed by the character of business in which the corporation is engaged. (Citing a long list of authorities).

The Court continues:

"There is an entire failure of any evidence as to the customary manner of dealing by the appellant from which it could be implied that the president was either authorized to sell the property of the corporation or to contract to pay anyone to effect a sale for it. The most that the evidence tends to prove in the way of clothing him with an apparent authority to bind the corporation by the contract sued on is that the president has supervision of the drilling operations upon the "Jack Wells" lease, but any apparent authority that might arise from such employment by him could not be extended to authority to sell the lease, and without such authority he was without power to contract for the corporation to compensate one for making a sale. Elk Valley Coal Co. v. Thompson, supra; 2 Thompson on Corporations, Sec. 1576."

In Lawrence et. al. v. Montgomery Gas Co. et. al. (W. Va.) 106 S. E. 890, the Court held as follows:

> "Corporate action cannot be lawfully expressed or made binding by less than a quorum of directors or stockholders acting jointly in a meeting thereof regularly called and after due notice as provided by law or by-law of the corporation."

In the course of its opinion the Court said:

> "The law is well settled in this state as elsewhere that corporate action cannot be lawfully expressed or made binding by less than a quorum of the directors or stockholders acting jointly in a meeting thereof regularly called after due notice as provided by law or by-law. * * * * And as said in 3 Thompson on Corporations, Sec. 3906, cited and quoted in our case just referred to, 'When they (the directors) are not consulting together as a board, they are regarded as acting privately and unofficially.' * * * * There is no need of elaboration of this proposition by further reference to the authorities * * * * *.
>
> "Our decisions say that authority of the president or other officer to transact the ordinary business of the corporation will not impose liability on the corporation for extraordinary contracts made by them, involving expenditure of large sums of money for supplies or machinery, or the disposition of its plant or property, not implied by the nature of the business. Varney & Evans v. Hutchinson Lumber & Manufacturing Co., 70 W. Va. 169, 73 S. E. 321. And to be binding as a ratification of the unauthorized act of an officer or other agent of a corporation, the board of directors must not have been

ignorant of the facts in relation thereto. Flannagan v. Flannagan Coal Co., 77 W. Va. 757, 88 S. E. 397."

AUTHORITY TO SELL STOCK

In Rattvay v. Wickersheim Impl. Co., 36 Cal. App. 253, 171 Pac. 964, it was held:

> "The fact that Wickersheim was president and general manager of the corporation did not authorize Wickersheim to sell shares of stock of the corporation or determine the price for which they would be sold, OR TO EMPLOY an agent to find purchasers for the stock. Such transactions are not within the scope of the business which either a president or a general manager is by virtue of his office qualified to transact for the corporation." Citing N. W. Packing Co. v. Whitney 5 Cal. App. 105 89 Pac. 981.
>
> See also Demarest v. Spiral Riveted Tube Co., 71 N. J. Law, 14, 58 Atl. Rep. 161, on the sale of stock.

In the case of East Cleveland R. R. Co. vs. Everett, 19 Ohio C. C. 205, the court held as follows:

> "Where the president of a corporation is authorized to act as superintendent or general manager of a company in the conduct of its ordinary and routine business, his powers are not thereby so enlarged that he can legally of his own motion, undertake the sale of the company's bonds."
>
> See also Clarkson v. Keystone Oil Cloth Co., 23 Pa. Co. Court 189.

Waters v. American Finance Co. 102 Md. 212, 62 Atl. 357 was an action to collect commissions for the sale of stock on a contract made with the secretary and general manager of the company, held: *That the plaintiff was bound to produce affirmative proof of the authority of the general manager to make the contract, and that there is no presumption of such authority.*

In re Continental Engine Co., 234 Fed. 58, it was held:

> "Whatever may be the presumptive authority of the President of an Illinois business corporation to execute notes for its ordinary business transactions (See cases cited in Hallett v. St. Vincent College, 201 Fed. 471, 119 C. C. A. 647) there is no such presumption in favor of a payee who knows that the notes were given for other purposes. Neither securing fresh capital by the sale of additional stock, nor contracting to pay commissions therefor, is an ordinary business transaction of the corporation, within the implied powers of the president acting as general manager; so that, irrespective of the by-laws or the specific conditions upon which alone the note was to become effective, it was invalid as between the parties, because unauthorized either by the directors or shareholders of the bankrupt."

In Zarriello v. U-Need Ice Co. Inc., 191 N. Y. Supp. 207, it was held:

> "One employed 'as general manager, to employ the necessary help as might appear to be beneficial to the proper conduct of the company' was not thereby necessarily authorized to employ one to sell stock of the corporation."

In Great Southern etc. Company v. Guthrie, 13 Ga. App. 288, 79 S. E. 162, it was held that the agent of a corporation who was vice president and afterwards president of the corporation, did not authorize him to appoint other agents to sell corporate stock, holding that a quorum of directors is necessary for legal corporate action, and action of individual directors is insufficient and not binding. Likewise that the president of a corporation has no authority as such, to appoint agents to sell stock for the corporation."

The president of a railroad company has no implied authority to give a power of attorney for the sale of its bonds. Titus et. al. v. Cairo & F. F. R. Co., 37 N. J. L. 98.

Also see Copper King Co. v. Hanson, 176 Pac. 623 (at 625), (Utah), citing Camden Land Co. v. Lewis, 101 Maine 98, 63 Atl. 531, on this same subject of the lack of authority of president or general manager to sell capital stock.

AUTHORITY TO MAKE EXTRAORDINARY CONTRACTS

In Wainwright v. Roots Co., 176 Ind. 682, 97 N. E. 8, the general manager of the corporation entered into a contract on behalf of the corporation to erect a building and install machinery and making plaintiff superintendent for 5 years at a certain salary and allowing him a certain portion of the profits. Held: That the business must be conducted by the board of directors, and that the general manager had no authority to make such a contract.

In Caldwell v. Mutual Reserve Fund Life Assn., 65 N. Y. Supp. 826, 53 App. Div. 245, is a case wherein plaintiff sued the insurance company for $50,000 for alleged services as manager of its Liverpool Department and under an alleged contract to secure a competent person to take his place, and for such services to pay certain admission fees for a term of ten years.

The Court shows that pursuant to the statute under which the company was organized and under its by-laws, the directors were authorized to elect three of their number to constitute an executive committee. The plaintiff claimed he made his contract with Bloss, the vice-president of the executive committee acting in conjunction with one Haywood, general manager of the company at London, and that said contract was authorized by the other two members of the executive committee. The referee found for the plaintiff for the full sum with interest, and judgment was entered for that sum. The Court on appeal reversed the judgment, saying in part:

> "But there is no satisfactory proof that the executive committee, acting as such, ever conferred authority upon Bloss and Haywood, acting separately or in conjunction with each other. No resolution of the executive committee or record of its proceedings was shown from which such fact could be found or inferred, and even if such fact had been shown, it would not have availed the plaintiff for the reason that the executive committee did not have the power to thus bind the defendant. But, if it be assumed that the executive committee did have such power it certainly did not have the power to delegate that

> authority, involving in its nature the exercise of judgment of the very highest character, to one of its members. It could only act as a whole in whatever was done in which each member either participated or had an opportunity to participate. And it cannot be presumed in the absence of some act of the corporation specially conferring authority upon Haywood, that simply because he was the general manager in London he had power to bind the defendant to contracts of an extraordinary nature, and of a character that would involve the corporation in enormous obligations, extending over long periods of time. Citing Comacho v. Engraving Co., 2 App. Div. 369, 37 N. Y. Supp. 725. But it is said that the defendant subsequently ratified the contract with Bloss made with the plaintiff. * * * There is, however, no force in this contention, inasmuch as no evidence was introduced upon the trial which established that the board of directors of the defendant ever knew that such a contract had ever been made. * * * There can be no such thing as ratification unless the one ratifying acts with full knowledge of what has been done. Citing Trustees, etc. v. Bowman, 136 N. Y. 521, 32 N. E. 987."

The case of Camacho v. Hamilton etc. Co., 2 App. Div. (N. Y.) 369, 37 N. Y. S. 725, was likewise an action for breach of contract of employment for three years at a stipulated salary. The contract consisted of two letters written by plaintiff and by the Vice President and general manager of the corporation. The trial court excluded these letters as evidence of a contract on the ground that no authority was shown on the part of the general manager to enter into such a contract on behalf of his corporation.

This ruling was upheld by the appellate court. In the opinion it is said:

> "But no presumption of law can be indulged in that, because a person acts as such manager, i. e. general manager, he has the power to bind his principal to contracts of an extraordinary nature of such a character as would involve the corporation in enormous obligations for long periods of time. If a general manager, simply by virtue of being charged with the ordinary conduct of the business, would have a right to bind his principal to a contract for service for three years involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods, and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?"

Laird v. Michigan Lubricating Co., 153 Mich. 52, 116 N. W. 534, is a case directly in point with this case. The management of the affairs of the corporation was by law entrusted to a board who were chosen annually. The secretary, treasurer, and manager for the company entered into a written contract with the plaintiff whereby he was employed for a period of three years at a salary of $1500.00 per year. The president and board of directors had no knowledge of this contract until some time after it was made and when he learned of it the president disputed its validity, and before the expiration of the three years, plaintiff was discharged. He sued for breach of contract. It was held that the Manager had no authority to bind the company by such a contract. The court speaking through Mr. Justice Montgomery said:

> "It would seem clear that in the absence of any evidence of custom or any holding out as possessed of authority, other than the bare fact that he was secretary-treasurer and manager, the authority to continue employment not only beyond his term of office but beyond the period during which the entire management of the affairs of the company might be changed by the election of a new board of directors, would not be implied."

In Francis v Spokane, etc. Club, 54 Wash. 138, 102 Pac. 1032, the Court held that where the management of a corporation is conferred on a board of directors, the manager has no authority to employ a clerk for 26 weeks.

In Carney v. New York Life Ins. Co., 162 N. Y. 453, 57 N. E. 78, it was held:

> "A by-law of a corporation, adopted by the board of trustees, whose terms of office continued only four years, authorizing the president and actuary of the company to appoint, remove, and fix the compensation of each and every person employed by the company, does not authorize a contract by the president and actuary in behalf of the corporation employing a person for life.

In the course of the opinion the Court said:

> "We may assume that the power given to appoint was intended to include the power to employ, and to agree upon the compensation that should be paid; but in assuming this we cannot believe that the board of trustees, in adopting the by-law, intended to invest the executive officers named with the power to enter into unreasonable contracts as to the term of employment."

In Thompson v. Central Pass. Ry. Co., 80 N. J. L. 328, 78 Atl. 152, there were a number of suits pending against the company, and its president entered into an agreement to pay the assignor of the plaintiff $10,000 if he could secure the dismissal of these suits which were interfering with the construction of the railroad. This he did; in an action to recover the $10,000. Held: That the agreement was of a peculiar character, and being made without the knowledge of the board of directors, did not bind the corporation.

In Rennie v. Mutual Life Ins. Co. of New York, 176 Fed. 202, it was held in affirming a directed verdict for the defendant that although the by-laws provided the president should have the general direction and superintendence of the affairs and of the officers of the company and should establish rules and regulations for the conduct of the business of the company, nevertheless, he was not vested with the power to make an oral contract with a general agent binding the company after the termination of such agency in a certain contingency to pay said agent a sum annually during the remainder of his life sufficient for his support.

Tobin v. Roaring Creek & C. R. Co., 86 Fed. 1020, was a case in which plaintiff sued the company on an alleged contract for procuring a loan of $100,000 for the company, the plaintiff to receive ten per cent of that sum. The contract was claimed to be made with Samuel B. Diller, its president. A non-suit was granted, and the court in passing on the authority of the president, said:

> "The transaction which it is claimed the corporation employed the plaintiff to make was an ex-

traordinary one, and quite beyond the sphere of its ordinary business and the customary scope of the agency of a president of such corporation."

In re Trion Mfg. Co., 214 Fed. 161, it was held that the acts of the president of a corporation organized to manufacture cotton goods with power to engage in mercantile business in connection with its factory, in buying and selling in the name of the corporation cotton futures as a mere matter of speculation are *ultra vires*, and the broker conducting the transactions has no claim against the corporation on account thereof.

In Chard v. Ryan-Parker Const. Co., 169 N. Y. Supp. 622, it was held:

> "The president of a construction corporation could not bind it on a contract giving one, who was neither engineer nor lawyer, half of the profits of a big job, in return for personal services, unless expressly authorized to do so, although the president had general control of the corporation."

And on the further ground that such a contract was one of an extraordinary nature.

And the president of a manufacturing company could not be presumed to have had authority to employ brokers on behalf of the corporation, to sell a mill and quarry which were a part of the corporation's manufacturing equipment. McCorry v. John C. Wiarda & Co., (1912) 149 App. Div. 863, 134 N. Y. Supp. 667.

The president of a railway corporation has no implied power to contract in its behalf for services in procuring

contractors to build the railroad. Risley v. Indianapolis B. & W. R. Co. (1874) 1 Hun (N. Y.) 202.

In Bright v. Metairie Cemetery Association, 33 La. Ann. 58, the plaintiff, an attorney at law, was employed by the president of the corporation to conduct certain litigation. He sued to recover compensation. The trial court permitted him to prove the contract without first proving that the president was authorized by the board of directors to make the contract. This was held to be erroneous. The Court said:

> "We are clear that the court erred in admitting this evidence, all of which should have been excluded."

In Northwestern Packing Co. v. Whitney, et. al., 5 Cal. App. 105, 89 Pac. 981, a letter was written by the President of the corporation, and in it he said:

> " 'I will give you the handling of all the salted salmon packed by the Northwestern Company and other companies in which I may be interested this year.' It is not attested by the seal of the corporation. There does not appear to have been any resolution of the board of directors authorizing the contract. The salmon pack of 1902 was the property of the plaintiff, an artificial being, created under the provisions of the statute. The title was in the corporation and not in Pedersen. The corporation could only act, could only speak, through the medium prescribed by law—the board of directors. The statute under which the corporation was created contains the express mandate: 'The corporate powers, business and property of all corporations formed under

> this title must be exercised, conducted, and controlled by a board of not less than three directors.' Civ. Code Sec. 305. The rule has been adhered to by the courts. Gaswiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Alta Silver Mining Co. v. Mining Co., 78 Cal. 629, 21 Pac. 373; Fontana v. Pacific Cann. Co., 129 Cal. 51, 61 Pac. 580. The President of a corporation has no authority by virtue of his office to buy or sell the property of the corporation, or to make an executory contract binding upon the corporation. Bliss v. Kaweah C. & I. Co., 65 Cal. 502, 4 Pac. 507. The doctrine of estoppel does not apply because the corporation has not availed itself of any benefit in any way or manner by reason of the alleged contract."

And see Stephen v. John L. Roper Lumber Co., 75 S. E. 933, 41 L. R. A. (N. S.) 1141, in which it is held that a superintendent of a lumber camp has no implied authority to contract with an employee who is being laid off and pay him a monthly salary in consideration of his refraining from taking other employment, and in which there is a thorough discussion of the extent of the authority of agents and that they are not empowered to make unusual and extraordinary contracts, and which case cites numerous decisions, among them Western National Bank v. Armstrong, 152 U. S. 346.

In Vogel v. St. Louis Museum, 8 Mo. App. 587, it was held:

> "Nor has the president of a business corporation any power as such to appoint a general business manager for the corporation without consent of the board of directors."

AUTHORITY IN MISCELLANEOUS MATTERS

In Kline Bros. & Co. v. Royal Ins. Co., 192 Fed. 378, it was held that the president had no authority to make a contract for insurance in its behalf when there was a by-law providing that "all contracts or obligations of any kind which may be entered into shall be made by the board of directors," although the by-laws further provide: "The president shall preside at all meetings and have supervision of the affairs of the company UNDER THE DIRECTION OF THE BOARD OF DIRECTORS.

In the case of T. E. Wells & Co. v. Shoop, 208 Fed. 393, it was held that the president and active manager of a corporation with the secretary had no authority to execute a chattel mortgage on certain personal property, to-wit: elevators, and that the same should have been authorized by the board of directors. Speaking of the action of the president and manager, the court says: (p. 397)

> "But the argument is made that because Walter was the president and active manager of the business of the corporation he was *ipso facto* empowered to execute the mortgage in question. Without doubt his general authority as chief executive officer and active manager of the business of the corporation empowered him to transact the usual and ordinary current business in the usual and ordinary course, such as contracting for the purchase or sale of grain or coal in which the corporation was authorized to deal, and to perform like acts necessary and incidental to the conduct of the business, but we are of the opinion that this implied authority did not comprehend the power to dispose of the building or ma-

chinery or appliances which the corporation had acquired and was then using for the transaction of its business."

In re St. Helens Mill Co., Fed. case 12,222, Circuit Justice Field in approving of the opinion of Judge Deady says:

> "It presents with clearness and precision the necessity of a corporation attaching its seal to an instrument to render it operative as a deed; and holds in accordance with the uniform current of the authorities that the power to execute a mortgage by its officers can only be conferred by vote of the directors meeting together and acting as a board."

See also:

> In re Progressive Wall Paper Corporation, 230 Fed. 171,

holding that a majority of the stockholders of a corporation must assent to a mortgage.

In Maryland Finance Corporation v. Duvall, 284 Fed. 764, it was held the president had no power to execute a chattel mortgage on the company's property, and in discussing generally the power of a president, the Court said:

> "The doctrine of the limitation of the power of a president of a corporation to incumber its assets is of almost universal recognition.
>
> " 'He has no implied authority, simply by virtue of his office as president, to make any contract for the corporation * * * or to convey the property of the company, or to sell or sign the corpora-

tion's notes, bonds, or other assets, or to mortgage any of the corporate property, or surrender or transfer the corporate franchises.' Purdy's Beach on Private Corporations, vol. 2, sec. 793.

" 'An officer or agent of a corporation, in order to bind the corporation by a mortgage or pledge of its personal property, must have express or apparent authority to do so, and this power is not inherent in the office of the president, or of the secretary * * *.' 7 R. C. L., 645.

" 'The president, or the president and secretary, have no power, merely by virtue of their offices, to execute a mortgage or pledge of the property of the corporation, even though he or they own all or most of the stock, and this rule is particularly applicable where the authority to manage and conduct corporate affairs is expressly vested in the board of directors.' 14-A Corpus Juris, 465.

" 'As a general rule a person dealing with a corporation is bound to know whether or not the person who assumes to represent it and to act in its name is authorized to do so, and the nature and extent of his authority; he must take notice that such authority is derived from statutes, by-laws or usages which more or less define its extent, and is chargeable with notice of limitations and restrictions imposed by statute or by the character or constitution of the corporation.' " 14-A Corpus Juris, p. 351, Sec. 2213.

In Murphy v. Cane, Incorporated, 80 N. J. L. 163, 76 Atl. 323, it was held the president of a building construction company has no implied power by virtue of his office as such to award subcontracts on construction work for

which his company has the main contract. (Citing a large number of authorities.)

In Rizzuto v. English Lbr. Co., 44 Colo. 413, 98 Pac. 728, it was held that the general manager of a corporation engaged in selling lumber at retail has no power by virtue of his employment to borrow money on the credit of the company or to give the latter's note therefor. (Citing several cases.)

In Rasnick v. Ritter Lumber Co., 219 S. W. 801, it is held that the Superintendent of the company did not have authority to compromise a threatened suit against the company by making a contract giving the party who threatened the suit employment in the saw mill, and in the course of the opinion it was held:

> "It is not alleged that Kopp, the superintendent of the defendant, possessed authority to bind his principal upon the contract sued on. While the Articles of Incorporation of defendant do not anywhere appear in the record, we know as a matter of law that a corporation authorized to engage in the manufacture of lumber would have no authority as such to engage in the compromise of suits not filed against it, but filed only against its employees individually, and we likewise know that a superintendent of a saw mill is not by virtue of his office a compromiser of law suits filed against others than his principal and covering matters not indirectly affecting the latter's business."

In Hall v. Passaic Water Co., 83 N. J. L. 771, 85 Atl. 349, it was held that the Corporation was not bound by an unusual contract made by its superintendent, not shown to

be within the scope of his express or implied authority, nor in the course of the ordinary business of the company. The superintendent entered into a contract for the supply of water at a certain time for fire purposes.

Held: That the corporation was not bound.

In Roben v. Ryegate Light & Power Co., 91 Vt. 402, 100 Atl. 768, it was held that the general manager of an electric power company, who is also its president, *has no implied authority to contract to enlarge the plant's capacity.*

In Victoria Gold Mine Co. v. Fraser, 2 Colo. App. 14, 29 Pac. 667, the syllabus reads:

> 1. "The general manager of a milling company has no power, by virtue of his office, to bind the company by contracts for the purchase of machinery.
>
> 2. "In an action against a milling company for the price of machinery sold on the order of defendant's general manager, plaintiff cannot recover unless he shows either that the manager had authority to bind defendant by the purchase or that defendant ratified it.
>
> 3. "In such case it was error to refuse to charge that, where a person deals with a corporation through one of its members, he does so at his peril, and it is his duty to see that the person with whom he transacts his business is actually such agent, and that what he did was within the scope of his authority."

In Napier v. Mozena Coal Co., 103 S. E. 125, it was held:

"Neither C. C. Deegan, defendant's mine superintendent, with whom plaintiff says he contracted, nor Eric Pyle, Deegan's successor in the same capacity, had express authority to bind the company by the alleged promise to advance $800, the sum required to redeem the teams from indebtedness, a promise not definitely proved, and it is gravely doubtful whether either of them had implied authority to do so. Their duties as superintendents, it is true, according to the proof, related to the employment and discharge of men and to the general management and supervision of the particular portion of the business intrusted to them. Their power to bind the corporation was not restricted solely to acts and promises made within the scope of their express authority, but included also such as were by implication reasonably necessary to effectuate the results authorized, in the usual and customary manner. They necessarily possessed authority requisite to enter into such contracts as were reasonable and usual in the operation of mines. But whether a particular contract falls within such implied power depends upon whether its execution is reasonably necessary to, and customary and usual in, the performance of the duties to be discharged by superintendents." Citing a number of cases and continuing:

"In the case first cited this court reconized that there was no implied authority in the general manager of a corporation operating a summer hotel to make unusual, extraordinary, or unnecessary contracts for labor, but held that the employment of a carpenter to reside on the ground and work out of season in making necessary repairs, usually made at such time, and to have the property in readiness for

the coming season, was not unusual or unnecessary and therefore was within the implied power of the manager, though extending slightly beyond the term of his own employment."

In Aerial League of America v. Aircraft Fireproofing Corporation (N. J.) 117 Atl. 704 the Court held.

"It was incumbent upon the plaintiff to show that the contract upon which suit was brought was the contract of the defendant. To bind the defendant, the contract must be proven to have been the act of the defendant either by corporate action, the act of an authorized agent, or by adoption and ratification. Beach v. Palisade Realty & Amusement Co., 86 N. J. Law, 238, 90 Atl. 1118. A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws, or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them. It often results that one occupying a high official position in a corporation is without the power to bind the corporation by contract. Thus, in the case of Thompson v. Central Passenger Railway Co., 80 N. J. Law, 328, 78 Atl. 152, a president of a corporation was held to have had no authority to bind the corporation by the contract therein considered. To the same effect is Mausert v. Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801. In Beach v. Palisade

> Reality & Amusement Co. supra, a second vice-president of a corporation was held to have had no authority, under a power to sign contracts in connection with the improvement, operation and maintenance of Palisade Park as an amusement enterprise to make a contract for the purchase of the corporation's own stock and bonds. In Stokes v. New Jersey Pottery Co., 46 N. J. Law, 237, a president of a corporation was held to have had no power to give a bond and warrant to confess judgment against the corporation. In Titus v. Cairo & Fulton Railroad Co., 37 N. J. Law 98, a power of attorney to sell the railroad company's bonds signed by the president was held invalid. These cases suffice to show that one dealing with a corporation must be apprised of the powers of the officers or agent purporting to act for the corporation, if he seeks to make a contract which will bind the corporation."

There remains still another reason why the alleged contract should not be enforced and why plaintiff in error cannot recover in this action, and that is that the record in our opinion discloses that there was an understanding between Bates and Early to divide any benefits that might accrue from the alleged contract. Let it be remembered that Oregon-American Lumber Co. was organized in June, 1917; that on the 31st day of July of that year it acquired the vast holdings of timber lands in Oregon, which are mentioned in the complaint; that Early was a director and vice-president of the company and the only officer or stockholder in the state of Oregon; Bates was a resident of Oregon, and represented Dubois, the party from whom these lands were purchased in the negotiations between him and defendant in error, and Early, so far as he participated in

these negotiations represented defendant but as soon as the deal was closed, Bates received a commission from Dubois, which he divided with Early, paying the latter $17,000.00. (Tr. of Rec. 172.)

Now plaintiff in error alleges that immediately after defendant in error acquired title to these lands, he was employed by it to look after this property and to assist defendant in error in marketing the same, and in developing the property, marketing the timber thereon and in devising ways and means for securing the best possible returns from the property. This alleged employment, it is claimed was by a contract made by Early on behalf of defendant in error. By it Early attempted to arrogate to himself the authority of the board of directors of defendant in error and to turn over to Bates virtual control and management of this vast tract of timber lands and to confer upon him powers greater than were possessed by the general manager. It is claimed by Bates and Early that this was a continuous employment. If this were true, Bates would have occupied a position of trust with defendant in error and could not have accepted any employment from others in any matter that would conflict with the interest of defendant in error, and yet, it appears from the record that in the only instance in which defendant in error made any sale or disposition of any of its lands, viz: the sale to Inman-Poulsen Co., Bates represented the purchaser and instead of trying to secure the best return possible for defendant in error he sought to secure for Inman-Poulsen Co., the lowest price and best terms possible, and when this deal was closed Bates received a commission from Inman-Poulsen Co., $17,000.00 of which he paid over to Early.

Again: In the negotiations for the sale of certain lands to B. L. Porter or The Kerry Timber Co., Bates received a letter from Porter authorizing him to offer defendant in error a specified price for certain timber lands, and throughout the negotiations which followed Bates represented the proposed purchaser and again sought to make the best possible bargain for such proposed purchaser, and at the same time Early and Bates were trying to secure 2½ per cent commissions to be paid to Bates if a sale should be consummated (Plaintiff's Ex. 4, Tr. of Rec. 228) which if received by Bates would no doubt have been divided with Early as had his commissions on other deals. And now plaintiff in error though he represented Porter and The Kerry Timber Co., throughout these negotiations has the temerity to claim from defendant in error commissions amounting to $39,117.45.

One of the most remarkable things about this alleged contract is that it is claimed by plaintiff in error and testified to by Early that if the former succeded in consumating a deal of sale or purchase or leasing, he was to be paid a commission, but if he did not succeed he was to be paid a reasonable compensation for his services and to be reimbursed his expenses. So no matter how any negotiations might terminate he would always be winner. With him, assisted by Early, it was "Heads I win, tails you lose."

We quote from the testimony of Early as to the Inman-Poulsen Co., deal, found on pages 209, 210 and 211, of the transcript of record.

Q. The commissions that were paid on these deals, did you get any portion of them?

A. Yes, sir. (188)

Q. How much? A. $17,000.00.

Q. $17,000.00. Was that during the time you were still an employee of the company, too?

A. Yes, sir, but I didn't make the price on the timber and had no understanding as to commission.

Q. Did you report that fact to any officer, or to your Board of Directors?

A. No, sir, because I didn't make the sale.

Q. Do you know who else shared in these commissions?

A. No, I do not.

Q. Do you know whether anybody else did or did not?

A. No, I do not.

Q. So as a matter of fact, while Bates represented Inman-Poulsen in the deal, and you now contend that the Oregon-American Lumber company had him under a course of general employment, and he at the same time in turn had you under employment? A. Who did?

.Q Bates? A. No, he did not.

Q. Well, he paid you $17,000.00 anyway, didn't he?

A. Yes, he did.

Q. What for?

A. I don't know what for. He said simply he would have to pay it to the Government on his income tax if he didn't.

Q. You don't know what he paid it to you for at all?

A. No.

Q. You never even reported that to Mr. David C. Eccles did you? A. I did not do that.

Q. That was one of the things that you never took up with anybody in connection with the company? A. No. sir.

Q. Did you ever account to the company in the trust capacity that you then held as its vice-president—did you ever account to the company and turn back into its treasury this $17,000.00?

A. No, sir, because I didn't take account of it. It didn't belong to them. (189.)

Bates as agent for Dubois negotiates the sale of over 27,000 acres of timber lands to defendant in error, for over three and a half millions of dollars in July, 1917. During these negotiations, Early as director and the vice-president of defendant in error, was ostensibly assisting defendant in error and acting in the interest of its stockholders, and dealing at arms length with Bates and his principal, Dubois. As soon, however, as the transaction was closed, Early was paid by Bates, a commission of $17,000.00. Let it be remembered that Bates and Early both lived in the City of Portland, while all the other officers and stockholders of defendant in error lived in Utah. This being the situation, Early, acting on behalf of defendant in error, according to the complaint and his own testimony, attempted to commit defendant to one of the most extraordinary contracts it is possible to conceive—a contract which according to the testimony of Early, divested

the board of directors, and the general manager of defendant, of the control of the business of the corporation and invested Bates with power to make expenditures on behalf of defendant in error to an indefinite amount and to involve it in contracts and obligations mounting into millions of dollars; a contract authorizing Bates to negotiate for the purchase of railroads, for the leasing of railroads and the sale of all corporate property of the defendant in error, and all this and the terms of the contract resting in parol, and being done without the knowledge of any other director or officer of defendant in error, for Early testified that he did not consult any of the other directors, nor any other officer concerning this extraordinary contract. True he says he told D. C. Eccles of some of the activities of Bates, which he says were performed at his suggestion, but there is no evidence that he ever disclosed to any one that he had made or attempted to make any such contract as he says he made in August, 1917, or that he had assumed to make any contract with Bates.

The first item of alleged services under this alleged contract is set forth in paragraph 5 of the complaint and occurred on August 6, 1917, and, as is alleged resulted in securing for defendant in error an option to purchase a railroad and equipment for $300,000.00. It does not appear that the directors of the Oregon-American Lumber company ever knew or heard of this transaction until this action was commenced. In paragraph 6 he alleges he negotiated for transportation facilities over a certain logging railroad and according to the testimony of Early this was at his request, and without the knowledge of the directors of defendant in error. There is not a syllable of evidence

that the directors of defendant in error desired to secure such transportation facilities.

In paragraph 7, it is alleged that plaintiff in error negotiated in September, 1917, for the purchase by defendant in error of a half interest in the Portland and Southwestern Railroad Co., and succeeded in securing an offer of the sale of such interest to defendant in error for $140,000.00, coupled with an agreement to extend such railroad to the timber lands of defendant in error, the defendant in error to pay one half of the cost of such extension. All this was done without the knowledge of any other member of the board of directors of the defendant in error.

Can there be any doubt that the commissions paid by Bates to Early were paid for the purpose of inducing Early to enter into some arrangement by which Bates would receive large sums of money in the future from defendant in error? With all the other officers of defendant in error in Utah, and all its property in Oregon, Early, if he had possessed the authority to make the alleged contract, it would have been an easy matter for Bates with the assistance of Early to collect compensation from defendant in error upon every sale or purchase it might make, and could thus despoil the corporation of which Early was an officer.

The brief of plaintiff in error was not received by us until the foregoing portion of our brief was prepared and we have therefore had little opportunity to examine his brief, but we think it requires only very brief comment to show the fallacy of the contentions therein made.

Without attempting to examine in detail the statement of facts, we call the attention of the court to the fact that throughout the brief, counsel for plaintiff in error has intentionally or otherwise confused and confounded the Oregon-American Lumber Company, defendant in error, with the Oregon Lumber Company, another corporation, distinct from defendant in error.

Further there is no basis whatever for the claim that Chas. T. Early was general manager of defendant in error. On the contrary the articles of incorporation showed that David C. Eccles was the general manager and Early testified that the alleged contract was oral and made immediately after defendant in error obtained title to the property, and there is not a syllable of evidence that Eccles was consulted about the alleged contract.

The articles permitted the general manager to employ assistance under the direction of the board of directors. Early had no such authority, and yet it is claimed that he made on behalf of defendant in error a contract to pay compensation which was not fixed and under which contract plaintiff in error now claims $75.00 per day for his services and also his expenses, where no deal was consummated, and where any deal was consummated he claims commissions.

True Early had been appointed what is commonly called "process agent," or agent upon whom process against the corporation could be served but he possessed no semblance of authority to bind defendant in error by any contract.

We shall not attempt a review of the authorities cited by counsel for plaintiff in error, but content ourselves with

saying that none of these support their contention. They are merely to this effect, that a general manager has power to bind the corporation in matters pertaining to the administrative conduct of the affairs of the corporation, that is in carrying out the business plans of the board of directors. A general manager however, has no power to determine the business policy of the corporation.

The defendant had just become the owner of a large tract of virgin timber lands, valued at millions of dollars. There is not a word of evidence in the record to show that the board of directors had, at the time the alleged contract of employment was made or attempted to be made by Early and Bates, determined to buy, build or lease any railroads or railroad, or to build or lease any sawmills. Indeed at that time it appears defendant in error had not made any plans for the development, sale or disposition of any of these timber lands. Early testified (Rec. 140) that the first business that was done by the corporation after acquiring these timber lands was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad, and that he made those arrangements. This is the transaction referred to in paragraph 5 of the second amended complaint, in which it is alleged that plaintiff in error secured an option in favor of defendant in error, to purchase a railroad for $300,000.00. There is no evidence that the board of directors desired to purchase that or any other railroad.

It is an astounding proposition that to buy, build or lease railroads; to sell the corporate stock of the corporation, owned by it or its stockholders, or to sell its timber lands, is an ordinary administrative function, and there-

fore within the apparent authority of the vice-president or even the General Manager. We think no authority for any such doctrine can be found, and certainly none has been cited.

How then could Early bind the corporation to pay for services of any one, in securing an option to purchase this railroad? If the board of directors had determined to buy this railroad if a satisfactory price or offer could be obtained and had directed the general manager to negotiate for such purchase, that might lend some color to the claim that in employing Bates, the general manager, was only performing the ordinary administrative duties assigned to him, but this would confer no authority on Early, for Eccles and not he was general manager.

The same is true concerning the alleged negotiations with Coleman H. Wheeler, set out in paragraph 6 of the second amended complaint, and of the transactions set out in paragraphs 7 and 9. And so far as any negotiations for the sale of any of the lands of defendant in error is concerned it appears affirmatively that the corporation did not contemplate or desire to sell any of its lands, until late in the fall of 1920, but on the contrary was trying to finance its development but had not succeded. (Rec. Page 221) So that during all the time Bates and Early claim the former was employed to buy or lease railroads, and to sell large tracts of land for defendant in error, there was no desire on its part to sell any of its property, and it did not have the means to develop it, but was trying to raise means for that purpose.

It is difficult to understand how it can be claimed that Bates is entitled to commissions on the sale of stock to Central Coal & Coke Co., for Early testified that Mr. Eccles had had that matter up with Mr. Keith a long time prior to Bates attemptitng to interest Keith or his Company (Record Page 176.)

It is still more difficult to understand the contentions made on page 32 of the brief of plaintiff in error, that the defendant in error ratified the numerous acts of Early by making a sale of certain lands to Inman-Poulsen Company, for it is undisputed that in that transaction Bates represented Inman-Poulsen Co., and not defendant in error. So too in the Kerry Timber Co. negotiations, Bates represented Porter and the Kerry Timber Co., and all that Early did was done under directions of the board of directors of defendant in error, acting through Mr. DeVine.

There was no ratification of the alleged act of Early in making the alleged contract with Bates, or in consummating a lease with the United Railway Company, for there is no evidence that the directors knew anything about the alleged contract with Bates, nor that they knew Bates had done or claimed to have done anything to bring about the leasing of this railroad.

It is passing strange that if Bates had any such contract as he alleged, he never for more than three years presented any bill or claim for services or even for his expenses.

To summarize:

First—There is not only an entire lack of evidence to show that Early had any authority to enter into the alleged contract on behalf of defendant in error, but it appears

affirmatively that he had no such authority, and that the board of directors never heard of such contract.

Second—That even if Early had any such authority the contract was void under subdivisions 1 and 8 of Sections 808, L. O. L.

Third—That Bates was engaged in the business of a real estate broker and at no time had license as such broker and that he therefore cannot recover any commissions for negotiating for the purchase or sale of real estate.

Fourth—Even if any such contract was entered into between Early and Bates, it was conceived in fraud and conspiracy which renders it absolutely void and not binding on the defendant in error.

We respectfully submit that the judgment of this district court is both lawful and just and should be affirmed.

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